INDEX.

	Page.
STATEMENT OF THE CASE	1
THE BENEDICT CASE	2
THE SEABOARD AIR LINE CASE	5
ARGUMENT	6-30
CONCLUSION	30

CITATIONS.

CASES:	
Bauman v. *Ross*, 167 U. S. 548	7
Harvey v. *United States*, 113 U. S. 243	10
Maguire and others v. *United States*, Dist. Ct. for Conn	27
Tillson v. *United States*, 100 U. S. 43	10, 14
United States v. *Bayard*, 127 U. S. 251	10
United States v. *Cress*, 243 U. S. 316	30
United States v. *Highsmith*, 255 U. S. 170	27
United States v. *Jones*, 109 U. S. 513	7
United States v. *Lynah*, 188 U. S. 445	30
United States v. *North American Transportation & Trading Co.*, 253 U. S. 330	10, 15
United States v. *North Carolina*, 136 U. S. 211	10, 12
United States v. *Pfitsch*, 256 U. S. 547	10
United States v. *Rogers*, 255 U. S. 163	27
United States v. *Sargent*, 162 Fed. 81	28
STATUTES:	
Lever Act—	
Section 10	6
Section 12	25
Section 16	25
Section 25	25

In the Supreme Court of the United States

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA AND the city of New York, plaintiffs in error,
v.
GEORGE F. BENEDICT, AS SOLE SURVIVING trustee of the trusts created by the last will and testament of William C. Langley, deceased. } No. 394.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SEABOARD AIR LINE RAILWAY COMPANY et al., plaintiffs in error,
v.
THE UNITED STATES. } No. 407.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

These two writs of error raise the question whether interest may be allowed by the district courts upon the amount found by the court to be the value of property

taken by the United States under the Act of August 10, 1917, commonly called the Lever Act, 40 Stat. 276, in cases where the owner refused to accept the award made by the President and brought suit in the district court as authorized by said act.

The *Benedict case*, No. 394, comes from the Circuit Court of Appeals for the Second Circuit, and that court held that interest could be allowed. The decision of that court is reported in 280 Fed. 76, and the United States took the writ of error.

The *Seaboard Air Line Case*, No. 407, comes from the Circuit Court of Appeals for the Fourth Circuit, and that court held that interest could not be allowed. The decision of that court is reported in 280 Fed. 349, and the property owner took the writ of error.

The Benedict Case (No. 394).

By this writ of error the United States seeks to review a final judgment of the Circuit Court of Appeals for the Second Circuit affirming, so far as the United States is concerned, a judgment of the District Court of the United States for the Eastern District of New York, which awarded to the defendant, hereinafter called the Langley Estate, the sum of two million, four hundred thirty-nine thousand four hundred seventy-four dollars and seventy-seven cents ($2,439,474.77), which sum was fixed as the amount to be paid by the United States for land taken by the United States for war purposes under the Lever Act of August 10, 1917, 40 Stat. 276. This award included the sum of $358,226.82 by way of interest

upon the value of the property taken from the time of the taking down to the date of the decision (19th and 20th findings of fact, pages 275 and 276). The only point raised by the United States upon this writ of error is the power of the court to allow this interest.

The property consisted of land—both upland and land under water—in the County of Kings, City of New York, and was taken by the United States in April and May, 1918. In accordance with the Lever Act the President appointed a commission for the purpose of ascertaining and paying a just compensation for what had been taken. This commission made its award on May 2, 1919, and determined that the just compensation was $1,796,522.20 with interest at five per cent (5%) from May 1, 1918, to date of payment. The award was based upon a valuation of $1.10 a square foot for the property. The owners refusing to accept this award, the United States, on July 11, 1919, paid them 75% thereof, $1,347,396.65, with interest to that date and received a deed of the property. This suit was then brought.

In the year 1899 the Langley Estate had deeded to the City of New York so much of the land as was necessary to continue through the Langley property certain streets. Upon motion of the United States, which was originally the sole defendant, the District Court ordered that the City be brought in as a party defendant. This was done, the City appeared and answered, asserting title in itself in the said streets and in an area of 81,120 square feet. The trial court

determined that the fair and reasonable value of the property which the United States had taken was at the time of taking, $3,428,644, or at the rate of $2 per square foot, and entered judgment for that amount with interest from the date of taking, after making proper allowance for what had already been paid. It also found that the value was the same whether or not the City of New York held title to the lands within the streets hereinbefore mentioned, but that the conveyance from the Langley Estate to the City was void, wherefore title to the entire property was in the Langley Estate, and to it should be awarded the entire recovery (p. 329). To that judgment both the United States and the City of New York took writs of error. The Circuit Court of Appeals affirmed the judgment in so far as the writ taken by the United States was concerned but held that the court below had been in error with respect to the claim of the City and held that the City was entitled to a portion of the award represented by 81,120 square feet of land at $2 per foot, or $160,240, with interest thereon at six per cent (6%), from April 6, 1918. Inasmuch as the error was capable of correction by computation only, that court did not order a reversal but directed the Langley Estate to assign to the City of New York its just proportion of the judgment, and upon the filing of such an assignment the judgment was affirmed (p. 334). Whereupon writs of error were taken by the United States and by the City of New York, the claim of the United States being that no interest should be awarded against it, and the claim

of the State of New York being that the proportion of the award given it by the Circuit Court of Appeals was inadequate and should have been the further sum of $589,731.82 with interest. With the controversy between the City of New York and the defendant in error the United States has no concern.

The Seaboard Air Line Case (No. 407).

This writ of error is to the Circuit Court of Appeals for the Fourth Circuit.

The plaintiff in error, Seaboard Air Line Railway Company, was the owner of a certain tract of land containing 2.6 acres in the County of Charleston, South Carolina, subject to the lien of a mortgage to the other plaintiffs in error, Guaranty Trust Company and William C. Cox. On or about May 23, 1919, the President, under the authority of the Lever Act, requisitioned the premises. Thereafter the President, through the War Department Board of Appraisers, determined that the compensation to be paid for the premises was the sum of two hundred sixty-five dollars and eighty cents ($265.80) with interest thereon at the rate of 7% per annum from May 23, 1919. That amount being unsatisfactory, the plaintiffs in error brought suit in the United States District Court for the Eastern District of South Carolina. The case came on to be tried on the 3d day of May, 1921, and the following question was submitted to the jury for determination: "What, on May 23, 1919, was the fair and reasonable value which would constitute a just compensation to be paid for the taking

for public purposes of the lands mentioned and described in the petition herein" (P. 8.) The jury found the sum of $6,000 to be the answer to this question. Upon that verdict a judgment was entered for that amount, to which was added by special direction of the court a provision for interest upon that sum from the 23d day of May, 1919, at the rate of seven per cent. (7%) per annum, the statutory rate in South Carolina. The United States took the case by writ of error to the Court of Appeals for the Fourth Circuit, where the only point urged or considered was the power of the court to award interest upon the amount found by the jury to be the value of the property taken. That court held that the court below had erred in awarding interest and entered judgment reversing the judgment of the District Court and remanding the case with instructions to enter a judgment for the property owners for $6,000 without interest (p. 31), to which judgment the writ of error now before this court was taken.

ARGUMENT.

Interest upon the amount found to be the value of property taken for a public use, pursuant to the Lever Act, can not be awarded against the United States.

Section 10 of the Lever Act of August 10, 1917, 40 Stat. 276, is as follows, so far as is pertinent:

> SEC. 10. That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the Army or the maintenance of the

> Navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum will make up such amounts as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies. * * *

Under the Constitution, when private property is taken for public use, no particular method for ascertaining the just compensation to which the owner is entitled is necessary. All that is required is that it be conducted in some fair and just manner with opportunity for the owner to present evidence and be heard. *Bauman* v. *Ross*, 167 U. S. 548; *United States* v. *Jones*, 109 U. S. 513.

In the case of *United States* v. *Jones*, 109 U. S. 513, this court, by Mr. Justice Field, said:

> There is, in this position, an assumption that the ascertainment of the amount of compensation to be made is an essential element of the power of appropriation; but such is not the case. The power to take private property

for public uses, generally termed the right of eminent domain, belongs to every independent government. It is an incident of the sovereignty and, as said in *Boom Co.* v. *Patterson*, requires no constitutional recognition. 98 U. S. 406 (XXV, 208). The provision found in the 5th Amendment to the Federal Constitution, and in the Constitutions of the several States, for just compensation for the property taken, is merely a limitation upon the use of the power. It is no part of the power itself, but a condition upon which the power may be exercised. It is undoubtedly true that the power of appropriating private property to public uses vested in the General Government—its right of eminent domain, which Vattel defines to be the right of disposing, in case of necessity and for the public safety, of all the wealth of the country—can not be transferred to a State any more than its other sovereign attributes; and that, when the use to which the property taken is applied is public, the propriety or expediency of the appropriation can not be called in question by any other authority. But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition

> to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon.

Under the Lever Act, two methods were provided, and the property owner had his choice.

First, the President was directed to ascertain and pay it. This was direct, sure, and speedy, and if the property owner accepted all questions of interest or legal technicalities would be obviated.

Second, if the owner was unwilling to accept the President's award, he could take seventy-five per cent (75%) of it and sue for the balance deemed by him to be proper in order to make the award adequate. But this suit must be in the courts which the United States had empowered to decide claims against it, and we think it is obvious that such a suit must be regarded as an action upon the contract which the United States had made in the Act itself to pay just compensation.

When, therefore, the property owner declined to accept the President's award, and elected to sue, he must have realized that his suit would be subject to the delays incident to all litigation, and to the well-established principles governing such suits and the well-defined limitations which the United States had

fixed with respect to its liability. One of these limitations which had become thoroughly well settled was that interest is never recoverable on claims against the Government, in the absence of a statutory enactment, or of an express contract for the payment thereof.

The jurisdiction granted to the district courts under this section is to be exercised in accordance with the law governing the usual proceeding of the district court in actions of law for money compensation. *United States* v. *Pfitsch*, 256 U. S. 547. The act itself makes no provision for the payment of interest or for any special form of procedure or measure of damages, nor does it repeal or modify the provisions of sections 1090 and 1091 of the Revised Statutes relative to the allowance of interest on claims against the United States.

Interest, therefore, can not be allowed.

Tillson v. *United States*, 100 U. S. 43.
Harvey v. *United States*, 113 U. S. 243.
United States v. *Bayard*, 127 U. S. 251.
United States v. *North Carolina*, 136 U. S. 211.
United States v. *North American Transportation & Trading Co.*, 253 U. S. 330.

In *United States* v. *Bayard*, 127 U. S. 251, the principle was carried to the extent of holding that the United States could not be required even to pay over interest which it had actually collected upon funds of the claimant while in its possession. That case arose out of claims against Spain, settled by the

Spanish American Claims Commission pursuant to agreement between Spain and the United States. One Angarica filed a claim before the commission, which decided in his favor, and the full amount of the award was paid to the Secretary of State of the United States. The Secretary of State paid to the claimant the entire amount except five per cent (5%), which he retained until the Government of Spain should make provision for paying the expenses of the commission. Of the amount retained, so much as could be utilized for the purpose was invested in securities of the United States. Subsequently the amount retained was paid to the claimant, but the interest or income which had been earned by the investment thereof was not paid. This court held that a claim for this money, made against the Secretary of State, was a claim against the Government of the United States, and that the Government was not liable for the interest. This court said, Mr. Justice Blatchford delivering the opinion (p. 259):

> If there was any unlawful withholding from the petitioner of the $41,129.74, the money was withheld by the Government of the United States, acting through the Secretary of State, and any claim of the petitioner, based upon an unlawful withholding, was a claim against the Government of the United States. That claim, in the present controversy, assumes the shape of a claim for the increment or income alleged to have been actually received by the United States from the investment of the money for the time it was withheld), but

> the claim in that respect is not different in character from what it would have been if, instead of being a claim for increment or income actually received by the United States, it were a claim for interest generally, or for increment or income which the United States would or might have received by the exercise of proper care in the investment of the money.
>
> The case, therefore, falls within the well-settled principle that the United States are not liable to pay interest on claims against them in the absence of express statutory provision to that effect. It has been established as a general rule, in the practice of the Government, that interest is not allowed on claims against it, whether such claims originate in contract or in tort, and whether they arise in the ordinary business of administration or under private Acts of relief, passed by Congress on special application. The only recognized exceptions are where the Government stipulates to pay interest and where interest is given expressly by an Act of Congress, either by the name of interest or by that of damages.

In *United States* v. *North Carolina*, 136 U. S. 211, this court applied the same rule in favor of the State of North Carolina and against the United States—the rule that a sovereign can only be required to pay such interest as its legislature has specifically authorized. That was an action brought in this court by the United States against the State of North Carolina upon 137 bonds of the State. When the bonds became due, payment was demanded and

refused by the State. Afterwards, however, the State paid the bonds, together with all interest accrued thereon to the date of maturity; but the United States contended that it was entitled to recover interest upon the principal of the bonds after their maturity to the date of payment, while the State contended that there was no liability for interest after their maturity and therefore that payment had been made in full. The bonds themselves contained a provision carrying interest from the date of the bonds "until the principal be paid." This court, however, sustained the contention of the State of North Carolina and held that, in view of the statute under which the bonds were issued, the provision in the bond purporting to carry interest beyond the date of maturity was not enforcible. Mr. Justice Gray, delivering the opinion of the court, said (pp. 216 and 221):

> Interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or property, or of compensation, to which the plaintiff is entitled; and, as has been settled on grounds of public convenience, is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an Act of its Legislature, or by a lawful contract of its executive officers. *United States* v. *Sherman*, 98 U. S. 565; *United States* v. *Bayard*, 127 U. S. 251, 260, and authorities there collected; *Re Gosman*, L. R. 17 Ch. Div. 771. * * *

> In the light of the provisions of this statute, the agreement in the bonds sued on, that the principal sum shall be "redeemable in good and lawful money" at the place and day therein designated, must be deemed equivalent to an agreement that they shall be payable on that day; and if the further provision by which interest is payable half yearly "from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed," could, upon the face of the bonds and without regard to the laws under which they were issued, be sonstrued to include interest after the date at which the principal is payable, and for which interest there were no coupons to be surrendered, it can not be allowed such an effect, because the State of North Carolina has never authorized its officers to incur any such obligation in its behalf.

In the case of *Tillson* v. *United States*, 100 U. S. 43, Congress had referred to the court of claims to investigate "and ascertain the amount equitably due as damages for alleged breach of contract," and the question arose whether by the use of the word "equitably" it was not intended by the act that interest should be allowed. This court, speaking by Chief Justice Waite, said (p. 46):

> But if Congress had desired to grant such authority it would have been easy to have said so in express terms, and because it did not say so we are led irresistibly to the conclusion that it did not intend to give any such power.

These cases illustrate the inflexible character of the rule. No equitable consideration can be allowed to modify it. Even though the United States has actually collected interest, it can not be required to pay it over, and the United States itself is bound by the rule when it sues a sovereign State upon its bond, even when interest is nominated in the bond.

This whole question, and all the authorities were exhaustively reviewed by Mr. Justice Brandeis in delivering the opinion of the Court in the case of *United States* v. *North American Transportation and Trading Company*, 253 U. S. 330. That action was brought to recover the value of a placer mining camp situated on the public land near Nome, Alaska, which was alleged to have been taken by the Government on December 8, 1900, and also compensation for use and occupation thereof after that date. It appeared that about July 1, 1900, General Randall, commanding the Department of Alaska, took possession, as a site for an army post, of a large site of public land which included a mining claim. The company yielded possession of the part occupied by it, "being unable to withstand his authority," but at the same time demanded compensation, which General Randall promised would be paid. Thereafter, he recommended the use of the site for an army post to the Secretary of War, and pursuant to this recommendation the President, on December 8, 1900, issued an order by which the tract was reserved from sale and set aside for military purposes, and on December 20, 1900, the Secretary of War announced

it as a public reservation under the control of the War Department. The tract was used as an army post continuously since possession was taken by General Randall. The Government contended that the cause of action, if any, had accrued more than six years prior to the commencement of the suit. The court of claims found that the company's property was taken within the six years—that is, on December 8, 1900—and that its then reasonable value was $23,800. It entered judgment for that amount. Both parties appealed, the Government on the ground that the right of recovery, if any, was barred, the company on the ground that no compensation was allowed for the time, use and occupation between the entry of taking and the date of judgment. This court held "when the Government, without instituting condemnation proceedings, appropriates for a public use under legislative authority private property to which it asserts no title, it impliedly promises to pay therefor," and that the taking of the plaintiff's property did not take place until power to do so was exercised by the Secretary of War, and the plaintiff's cause of action, therefore, did not arise until after December 7, 1900, and was not barred by the statute of limitations. With respect to the matter of compensation for use and occupation from the date of taking to the date of judgment, the court said:

> The company contends that it should receive, in addition to the value of the property at the time of the taking, compensation for

the occupation and use thereof from that date to the date of the judgment—a period of nearly twenty years during which the company was deprived of the use of its property. This contention is based upon the decisions of many state courts that, upon the taking of private property for public uses, the owner is entitled to recover, besides its value at the time of the taking, interest thereon from the date on which he was deprived of its use to the date of payment. In a number of cases in the lower federal courts also the landowner has been permitted to recover interest from the time of the taking; but in each such case a statute had provided in some form that the condemnation should be conducted according to the laws of the State in which the land was situated—and under the law of the State interest was recoverable. *United States* v. *Engeman*, 46 Fed. Rep. 898; *Town of Hingham* v. *United States*, 161 Fed. Rep. 295, 300; *United States* v. *Sargent*, 162 Fed. Rep. 81; *United States* v. *First National Bank*, 250 Fed. Rep. 299; *United States* v. *Rogers*, 257 Fed. Rep. 397; *United States* v. *Highsmith*, 257 Fed. Rep. 401. These conformity provisions which relate only to the laws of States, can have no application to lands in Alaska; nor can they affect proceedings brought in the Court of Claims.

The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment, *Schillinger* v. *United States*, 155 U. S. 163, 168; *Basso* v. *United States*, 239 U. S. 602, but

upon the existence of an implied contract entered into by the United States. *Langford* v. *United States*, 101 U. S. 341; *Bigby* v. *United States*, 188 U. S. 400; *Tempel* v. *United States*, 248 U. S. 121, 129; *United States* v. *Great Falls Manufacturing Co., supra; United States* v. *Lynch, supra.* And the contract which is implied is to pay the value of property as of the date of the taking. *Bauman* v. *Ross*, 167 U. S. 548, 587; *United States* v. *Honolulu Plantation Co.*, 122 Fed. Rep. 581, 585; *Burt* v. *Merchants' Insurance Co.*, 115 Massachusetts, 1, 14. Interest may not be added because § 177 of the Judicial Code, re-enacting § 1091 of the Revised Statutes, declares that: "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest." *Tillson* v. *United States*, 100 U. S. 43. Congress, in thus denying to the court power to award interest, adopted the common-law rule that delay or default in payment (upon which, in the absence of express agreement, the right to recover interests rests) cannot be attributed to the sovereign. *United States* v. *North Carolina*, 136 U. S. 211, 216. That rule had theretofore been uniformly applied in our executive departments except where statutes provided otherwise. *United States* v. *Sherman*, 98 U. S. 565, 567–8. So rigorously is the rule applied, that, in the adjustment of mutual claims between an individual and the Government, the latter has been held entitled to interest on its credits

although relieved from the payment of interest on the charges against it. *United States* v. *Verdier*, 164 U. S. 213, 218–219. This denial of interest, like the refusal to tax costs against the United States in favor of the prevailing party, *Stanley* v. *Schwalby*, 162 U. S. 255, 272; *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 296, and the refusal to hold the United States liable for torts committed by its officers and agents in the ordinary course of business, *Crozier* v. *Krupp*, 224 U. S. 290, are hardships from which, with rare exceptions, *William Cramp & Sons Co.* v. *Curtis Turbine Co.*, 246 U. S. 28, 40–41, Congress has been unwilling to relieve those who either voluntarily deal with the Government or are otherwise affected by its acts.

The company argues that interest is allowed in condemnation proceedings, not *qua* interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title (see *Klages* v. *Philadelphia & Reading Terminal Co.*, 160 Pa. St. 386); and that collection of an amount, measured by interest, is not prohibited either by the statute limiting the powers of the Court of Claims or by the common-law rule which exempts the sovereign from liability to pay interest. *United States* v. *New York*, 160 U. S. 598, 622. This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected

as a part of the just compensation in condemnation proceedings brought by the Government. For, as suggested in *United States* v. *Sargent, supra*, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes in order to secure title to land. *Mason City & Fort Dodge R. R. Co.* v. *Boynton*, 204 U. S. 570. On the other hand, this suit brought in the Court of Claims is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. The suit is in effect an action on two counts—one for the value of the mining claim, the other for use and occupation after December 8, 1900, at the rate of $7,500 per year. If the company had brought the suit immediately after the taking, it clearly could not have recovered any amount for use and occupation; for a plaintiff suing in contract can recover only on a cause of action existing at the time the suit was brought. The loss to the company of the use of $23,800, which is found to be the value of the mining claim when it was taken nearly twenty years ago, must be deemed to be due, in part, to its delay in instituting the suit, and, in part, to the delays of litigation for which it may have been largely responsible. But as, in either event, the loss of the use of the money results from the failure to collect sooner a claim held

to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims power to allow.

On this branch of the case the Circuit Court of Appeals for the Second Circuit said in the *Benedict case* (p. 330):

> As to interest, it is to be noted that the acquisition of property under the Lever Act is only a summary species of what are commonly called condemnation proceedings. The justification for any condemnation is the necessity of taking something from a private person for a public use; and the justification for the summary procedure of the act under consideration is the overwhelming necessity for speed under the dreadful pressure of war. But whether the taking be by the familiar condemnation of peace or by the strong arm of a nation at war, the obligation upon the taker is always that recognized in this very statute, viz: to make "just compensation" to the owner. (Monongahela, etc., Co. vs. United States, 148 U. S. 312); and see a general consideration of the matter in National City Bank vs. United States, 275 Fed. 855.
>
> It is certain that the national immunity from payment of interest does not extend to condemnation proceedings. (United States vs. Rogers, 257 Fed. 397; United States vs. Highsmith, 257 Fed. 401, affirmed U. S. S. C., Feb. 28, 1921.)
>
> Since, therefore, just compensation by definition includes interest (Co. Agency, etc., Co. vs.

> American, etc., Co., 258 Fed. 363, p. 369), and this statutory method of arriving at compensation is analogous to condemnation proceedings, we are of opinion that the statutory rate prevailing in New York was rightfully allowed.

The Circuit Court of Appeals for the Fourth Circuit in the *Seaboard Air Line case* gave much more extended consideration to the question and concluded that the rule affirmed in the *North American Transportation & Trading Company case*, 253 U. S. 330, should be followed, and very carefully distinguished that case from the *Rogers case*, 255 U. S. 163. Its opinion is found in the record, pages 14 *et seq.* That court said (R. p. 17):

> In the *Rogers case*, Mr. Justice Day cited *United States* v. *North American Transportation Co.*, 253 Fed. 333, 334, 335, 336, and 337, a suit in its essential features like the one here, save that the latter came from the Court of Claims, and nearly twenty years had elapsed between the taking of the property, and the rendition of the judgment. In the last named case, Mr. Justice Brandeis most comprehensively reviews the authorities bearing on the entire subject, from which it will readily be seen that irrespective of what may be done in condemnation proceedings, brought by the Government against a citizen, interest will not be allowed where the government is being sued. This case would seem to remove all doubt on this generally accepted well settled question, and shows that the Government, entirely regardless of what may be said of the

injustice of its position, has hitherto consistently held to its right as at common law, not to be charged with the consequences of loss arising from delays, even if hardships ensue. The result in this respect, is similar to the refusal to allow costs to be taxed against the government, or to be held responsible for the tortious acts of its agents. These conditions necessarily arise in dealing with the sovereign and for which there is no redress.

In discussing the *Rogers case* that court continued (p. 19):

> The court based its ruling in this case upon the decision of *United States* v. *Rogers*, *supra*, 255 U. S. 163, a condemnation proceeding, and it is earnestly insisted, as it is necessary to do, in order to bring this case within the ruling in that case, that this is virtually a condemnation proceeding. Nothing could be further from the fact, as viewed by the court. What is, and what is not a condemnation proceeding, can hardly be the subject of serious discussion from a legal standpoint. It is one in which the Government in the exercise of its power of eminent domain, one of its most important requisites of sovereignty, institutes its suit against the citizen to acquire title to property, upon the awarding of just compensation for what is proposed to be taken. The Government is the actor, the mover. The citizen is the defendant, brought in involuntarily, for the purpose of having taken from him property belonging to him, upon compensation being made therefor. Upon the lawful conclusion

of such proceeding, and payment of the amount awarded for the property taken, title thereto vests in the government. In such proceedings, especially where conducted under the conformity act in states in which interest is allowed on condemnation awards, interest may, in some instances, have been awarded against the government; but the decision in the case of *United States* v. *Rogers, supra*, 255 U. S. 163, is believed to be the first and only case in which it has been suggested that interest could be awarded independent of such statute, if the court meant to so state, which is doubtful, it merely saying on the contrary, that it was not so bound because of the existence of the State statute, but nevertheless thought it a convenient and fair method of ascertaining the sum to which the owner of the land was entitled. The vital point in that case was that there was a state statute allowing interest. The district court and the circuit court of appeals followed the same in making the allowance of interest, which action the Supreme Court affirmed. As before shown, in that case the Supreme Court expressly recognized the doctrine of the disallowance of interest against the government, and it was careful to distinguish between that case, and that of *United States* v. *North American Transportation Co.*, 253 Fed. 330, supra, which we think is conclusive of this case.

The court held that the present case was in no sense a condemnation proceeding. Congress had authorized the President to requisition property and

pay just compensation for the same, and in case of dissatisfaction the owner was to receive at once seventy-five per cent (75%) of the award and was given permission to sue in the United States District Court for the rest of it. It held that "such action is but a plain and simple suit at law, to recover from the government upon an implied contract to pay for property lawfully taken but not paid for." The court then reviewed the other sections of the Lever Act:

> A review of other sections of the Lever Act, authorizing the requisition of property, will give added strength to the views herein expressed.
>
> Section 12 relates to factories, mines, and pipe lines; section 16 to distilled spirits, and sec. 25 to coal or coke mines or businesses. Each of these three sections provides in identical terms that a person dissatisfied with the President's award, shall be entitled to sue the United States, but each section makes provision for suit against the United States to recover just compensation, in terms materially different from those of sec. 10, that is to say, these three sections provide for suits (sec. 145, Jud. Code) in the Court of Claims where the amount in controversy exceeds the sum of $10,000.00, and in the district courts (sec. 24, para. 20, Jud. Code), concurrent with the Court of Claims, where the amount involved is less than $10,000. The Court of Claims is inhibited from awarding interest prior to the time of the rendition of the judgment, unless the same be expressly stipulated for (Sec. 177, Jud. Code), and a district court

> sitting as a court of claims, at least by analogy, has no greater or other power. It can hardly be conceived that Congress in making provision for payment of property requisitioned by the Government, under the same act, meant to deny interest to claimants under some sections of the law, and leave it open to courts to allow the same on awards under other provisions thereof.

The court concluded that it had no discretion in allowing or withholding interest, nor could it be influenced by mere equitable consideration of what might appear in the particular case to be just, and said (p. 21):

> It may not substitute its judgment for that of Congress, and it should be slow to assume that Congress did not act advisedly and wisely in foreseeing that during a great war, and the period following its conclusion, all sorts and kinds of claims would have to be met and adjusted, necessarily consuming much time, and almost inevitably involving heavy loss to the government. Under these conditions, Congress rightfully refused to impose upon the Government the further burden of paying interest on claims, pending delays incident to such contests. Indeed, all claim of injustice on the part of the Government is silenced, when it undertook voluntarily the payment in advance of seventy-five per cent of its award, on account of such claims.

This same view was taken by the District Court for the District of Connecticut in four cases decided

in December, 1921, and not reported. They were entitled *Maguire* v. *United States*, *Weibe* v. *United States*, *Sekres* v. *United States*, and *Heil* v. *United States*. In its opinion that court said:

> Counsel for claimants fails to distinguish between cases where the United States, as plaintiff, has instituted condemnation proceedings to obtain possession of property, and cases where just compensation must be awarded as a condition precedent which may include the addition of interest when so provided by the laws of the state within which the land is situated, and cases like the instant cases where the owners of the property have been awarded compensation under the exercise of the war powers of the Government and the failure of the owners to receive the entire amount awarded is because they elected to bring suit to recover what they alleged to be the value of their property. In the latter cases the failure of the property owners to receive the amount awarded has been due to their refusal to accept the amount awarded, so that the delay in the receipt of the entire amount of damages awarded is due, partly if not wholly, to the action and conduct of the property owners.

The *Rogers* and *Highsmith cases* were both condemnation proceedings to acquire real estate for Government uses and were regulated by the Act of August 1, 1888, 25 Stat. 357. Section 2 of this act provides that the practice, pleadings, forms, and modes of proceeding in causes arising under the provisions

and the date of the rendition of judgment. In this connection attention is invited to a large number of so-called overflow cases instituted in the Court of Claims and the United States District Courts under the provisions of the Tucker Act to receive just compensation for land taken by the United States as a result of overflow consequent upon the construction of locks and dams, starting with the case of *United States* v. *Lynah*, 188 U. S. 445, and ending with the case of *United States* v. *Cress*, 243 U. S. 316. It is to be noted that the only interest paid plaintiffs in the hundreds of suits decided during that period was the statutory interest at 4 per cent per annum allowed on judgments of the circuit and district courts (but not those of the Court of Claims) from the date of the rendition of same to the date of payment, as provided by Section 10 of the Tucker Act (24 Stat. L. 505).

CONCLUSION.

The question seems to narrow itself to this: Is the *Rogers* case to be understood as governing cases arising under the Lever Act, or does the rule which has been followed for years, and which was affirmed in the *North American Trans. & Trading Co.* Case, apply, as is claimed by the Government.

We can add but little to what was said by the court below in the *Seaboard Air Line case*. The distinction between condemnation proceedings under statutes containing "conformity provisions" and suits to recover upon contract express or implied has been clearly pointed out. These cases would seem to fall

within the latter class both in form and in fact. When Congress empowered the President to take property, and authorized him to "ascertain and pay a just compensation therefor," it might have made his determination or that of his Commissioners final. He did not do so, however, but gave the owner the right to reject the President's award, receive 75%, and sue upon contract for a further amount. If, in addition, Congress intended to confer upon the suitor exemption from the settled rule governing such suits, that intention must be found by implication. It is not found in the language. Is it not more reasonable to think that Congress, when it gave the additional right, understood that he who availed himself of it must bear the burdens well known to be incidental thereto?

For these reasons the judgment in No. 394 should be reversed in so far as it awards interest against the United States, and the judgment in No. 407 should be affirmed.

JAMES M. BECK,
Solicitor General.
ALFRED A. WHEAT,
Special Assistant to the Attorney General.
JANUARY, 1923.

○

of the act shall conform to the practice, pleadings, forms, and proceedings existing at the time in like causes in the courts of record in the State within which such circuit or district courts are held. In fixing the compensation the District Court and the Circuit Court of Appeals in affirming the judgment followed the New Mexico statute fixing the rate of interest at 6%. In doing this the Circuit Court of Appeals followed the provisions of the condemnation statute and also the decision in the case of *United States* v. *Sargent*, 162 Fed. Rep. 81, wherein the laws of Minnesota were followed where land was appropriated in that State. Mr. Justice Day recognized the immunity of the Government from liability for interest on claims against it and distinguishes claims of that nature from proceedings brought by the Government and says, at page 169:

> It is unquestionably true that the United States, upon claims made against it, can not, in the absence of a statute to that end, be subjected to the payment of interest. *Angarica* v. *Bayard*, 127 U. S. 251, 260; United States *v. North Carolina*, 136 U. S. 211, 216, cited and approved in *National Volunteer Home* v. *Parrish*, 229 U. S. 494, 496. In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U. S. 330.

The case of *United States* v. *Sargent*, 162 Fed. Rep. 81, also recognized as settled the immunity of the Government for the payment of interest on claims,

but held that a proceeding instituted by the United States for the condemnation of land for public use is not one to collect an account or claim but an adversary proceeding instituted by the Government against landowners for the taking thereof. In its opinion the Court said:

> It is well settled that, in the absence of a stipulation to pay interest or a statute allowing interest, none can be recovered against the United States upon unpaid accounts or claims. * * * It is upon or in analogy with this principle that the United States contends that interest upon the amount of the award in this case should not have been allowed. We are unable to agree with this contention. There is a great difference between the assertion of a claim or account against the United States by a person who possesses it and a proceeding of this kind instituted by the United States. This proceeding, instead of one to collect an account or claim against the United States, is an adversary proceeding instituted by the United States against owners of land to take it from them. The landowners are not plaintiffs prosecuting claims, but defendants resisting a proceeding to deprive them of what is theirs until a condition precedent is fulfilled. * * * The exercise of the right of eminent domain is a prerogative of sovereignty in this country, but it is subject to the condition imposed by the Constitution of paying "just compensation therefor."

FILED
JAN 22 1923
WM. R. STANSBU
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No. 394

In the Supreme Court of the United States

OCTOBER TERM, 1922.

THE UNITED STATES OF AMERICA and CITY OF NEW YORK, PLAINTIFFS IN ERROR.

v.

GEORGE F. BENEDICT, AS SOLE SURVIVING TRUSTEE OF THE TRUST CREATED BY THE LAST WILL AND TESTAMENT OF WILLIAM C. LANGLEY, DECEASED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR DEFENDANT-IN-ERROR

WILLIAM H. SEIBERT,
ROYAL E. T. RIGGS,
Of Counsel.

LODER PRINTING COMPANY, INC NEW YORK

INDEX

	PAGE
Questions presented for determination	1
Statement of case between plaintiff and United States	2
Statement of case between plaintiff and City of New York	4
Decision of the Circuit Court of Appeals	7
Outline of the argument	8
ARGUMENT	
I. The only question between plaintiff and the United States is the right to interest and the assignments of error do not present that question for review	10
II. Just compensation must include interest upon the value of the property at the time of the taking from the dates of the actual appropriation thereof to the date of payment therefor	11
(1) The trial court found as a fact that interest must be included to make just compensation	12
(2) The United States has conceded that interest is a necessary part of just compensation	14
(3) § 177 Judicial Code prohibiting the allowance of interest does not apply	15
(4) This action is merely one step in a proceeding in eminent domain in which just compensation is the issue and ultimate object	16
(5) The obligation to make just compensation is the same whether the government institutes the court proceedings or forces the property owner to do so	25
(6) Just compensation by definition includes interest from the time of appropriation to the date of payment	30

PAGE

(7) The requirement as to just compensation will not be satisfied unless interest be paid on the judgment itself..... 32

III. The Circuit Court of Appeals erred in requiring the plaintiff to execute and file an assignment of $162,240 of the judgment to the City of New York because..... 33

(a) The City had stipulated on the trial that it was entitled to no relief in this action 34

(b) The plaintiff was entitled to the judgment even if the title to the streets was in the City 37

(c) Title to the disputed streets was in the plaintiff 42

IV. The City's assignments of error presented no claim in the court below to any part of judgment, and the action of that court in ordering the assignment was a plain error which may be remedied in this court..... 54

V. The deed from the trustees of the Langley Estate if valid conveyed the property with 61st, 62nd and 63rd Streets from Second Avenue only to "the New York Bay" and terminated at high water mark..... 56

(1) The City cannot claim that the deed carried to the pier head line of 1890, as that point is not before the court under the pleadings..... 56

(2) Under the law of New York the conveyance "to the New York Bay" terminated at high water mark and such construction is corroborated by the map attached to the deed... 59

Conclusion 63

LIST OF CASES CITED

	PAGE
Behn M. & Co. *v.* Campbell, 205 U. S., 403	54
Benedict *v.* U. S., 270 Fed., 267	21
Borkman *v.* Kurzman, 94 N. Y., 165	62
Bradstreet, *ex parte,* 7 Pet., 634	59
Bullitt County *v.* Washer, 130 U. S., 142	59
Cairus *v.* Chabert, 3 Edw. Ch., 312	50
Chamberlin *v.* Gleason, 163 N. Y., 214	50
Chapman *v.* Barney, 129 U. S., 677, 681	59
Chirac v. Reinicker, 11 What, 280	59
Columbus Safe Deposit Co. *v.* Burke, 88 Fed., 630	54
Corning *v.* Troy Iron & Nail Factory, 15 How., 451, 465	54
Dooley *v.* Pease, 180 U. S., 126	13
Farmers Loan & Trust Co. *v.* Waterman, 106 U. S., 265	55
Filbin Corp. *v.* U. S., 265 Fed., 354	21
Fleet *v.* Dorland, 11 How. Pr., 489	50
Fritch *v.* U. S., 248 U. S., 458, p. 18	16
Gibson *v.* Luther, 196 Fed., 203	54
Gormley *v.* Bunyan, 138 U. S., 623	59
Grayson *v.* Lynch, 163 U. S., 468	13
Hamilton *v.* Kentucky Distillers & Warehouse Co., 251 U. S., 146, 156	12
Hansen *v.* Boyd, 161 U. S., 411	33
John Clarke Estate *v.* City of New York, 165 App. Div., 873	61
Keyser *v.* Phitz, 133 U. S. 138	56
Koenigsberger *v.* Richmond Silver Mining Co., 158 U. S., 41, 43	33
Mason *v.* United States, 219 Fed., 547	54
Matter of City of Buffalo, 139 N. Y., 422, 430	27
Matter of City of New York, 222 N. Y., 370	30
Matter of City of New York, 196 N. Y., 286	36-41
Matter of Mayor, 40 App. Div., 281	30

PAGE

Matter of Minzescheimer, 144 App. Dic., 576; aff'd 204 N. Y., 272 30
McCray *v.* United States, 195 U. S., 27, 61 11
McRoberts *v.* Bergman, 132 N. Y., 73 60
Miller's Estate, Tuck., Surr., 346 50
Milligan, *ex parte*, 4 Wall., 2 11
National City Bank *v.* U. S., 275 Fed., 855 27-30
Norris *v.* Jackson, 9 Wall., 125 13
Ogden City *v.* Weaver, 108 Fed., 564, 567 54
Payne *v.* Niles, 20 How., 219 55
People *v.* Stillings, 136 App. Div., 438; Aff'd 198 N. Y., 504 30
Pfitsch *v.* U. S., 256 U. S., 547 20
Pine River Logging Imp. Co. *v.* United States, 186 U. S. 279 56
Prince Line *v.* U. S., 283 Fed., 535 21
Robertson *v.* Downing, 127 U. S., 607 15
Rockaway Park Improvement Co. *v.* City of New York, 140 App. Div., 160 61
Russell *v.* Russell, 36 N. Y., 581 48
Scholle *v.* Scholle, 113 N. Y., 261 48
Seaboard Air Line *v.* U. S., 280 Fed., 349 21
Stanley *v.* Supervisors of Albany, 121 U. S., 535. 13
Stillwell *v.* Doughty, 2 Brad. Surr., 311 50
St. Louis *v.* Rutz, 138 U. S., 226 13
Stoffregen *v.* Moore, 271 Fed., 680 55
The Francis Wright, 105 U. S., 381 13
Thomas *v.* Evans, 105 N. Y., 601 50
Tiffany *v.* Town of Oyster Bay, 209 N. Y., 1, 9.. 61
Trustees of East Hampton *v.* Kirk, 68 N. Y., 459 60
Turco *v.* Trimboli, 152 App. Div., 431 48
Union Pacific Railway Co. *v.* Chicago R. Co., 163 U. S. 564 56
United States *v.* Benedict, 280 Fed., 76 21

PAGE

United States *v.* Cohen Grocery Co., 255 U. S., 81, 88 12
United States *v.* Cross, 243 U. S., 316, 326..... 12
United States *v.* Healey, 160 U. S., 136..... 15
United States *v.* Hermanos, 209 U. S., 339..... 15
United States *v.* Highsmith, 255 U. S., 170..... 16-32
United States *v.* Joint Traffic Assn., 171 U. S., 505, 571 11
United States *v.* Pfitsch, 256 U. S., 547..... 15
United States *v.* Rogers, 255 U. S., 163.....11-16-32-56
United States *v.* Sargent, 162 Fed., 81..... 16-32
United States *v.* Seaboard Air Line, 280 Fed., 349 21
United States *v.* U. S. Fidelity & Guaranty Co., 236 U. S., 514..... 13
Ward *v.* Joslin, 186 U. S., 142..... 13
Wetmore *v.* Porter, 92 N. Y., 76..... 48
Williams *v.* Cox, 3 Edw. Ch., 178..... 50
Wright *v.* Hollingsworth, 1 Pet., 165..... 59

Argued by
ROYAL E. T. RIGGS.

IN THE

Supreme Court of the United States

October Term, 1922.

THE UNITED STATES OF AMERICA and CITY OF NEW YORK, Plaintiffs-in-Error, AGAINST GEORGE F. BENEDICT, as sole surviving Trustee of the Trust created by the last Will and Testament of WILLIAM C. LANGLEY, deceased, Defendant-in-Error.	No. 394.

BRIEF FOR DEFENDANT-IN-ERROR.

Questions Presented.

The only question presented by the writ of error of the United States is whether the district court may allow interest on the market value of property ascertained as of the time of seizure, to the date of entry of judgment, as an element of "just compensation" in making an award under §10 of the Lever Act (Act of August 10, 1917, 40 Statutes 276, 279).

The question presented for determination between the United States and the City of New York and the

defendant-in-error is whether the Circuit Court of Appeals erred in requiring the plaintiff to execute an assignment of $162,240 of the judgment to the City.

Statement.

This is an action brought by the surviving trustee of the estate of William C. Langley, deceased, against the United States, under Section 10 of the Food and Fuel Act of August 10, 1917, known as the Lever Act, for just compensation for several blocks of water front property in New York Harbor requisitioned by the United States for an army supply base.

This act provides:

> "That the President is authorized, from time to time, to requisition foods, feeds, fuels, and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, seventy-five per centum will make up such amounts as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." 40 Stat. 276.

Practically all of the property was requisitioned on April 6, 1918. Property lying in the projected lines

of proposed 58th and 63rd Streets had been overlooked in the description of the original requisition and this adjoining property was requisitioned on May 31, 1918.

The President, acting through the War Department, determined that just compensation to be paid to the owner was at the rate of $1.10 per square foot, amounting to $1,796,522.20, with interest thereon at the rate of 5% per annum from May 1, 1918. This amount was not satisfactory. The defendant-in-error accepted seventy-five percent of the said award with interest thereon at 5% from May 1, 1918 to July 11, 1919, the date of payment, and brought this action for just compensation.

The sole issue between the defendant-in-error and the United States of America was that of just compensation for the property taken. As plaintiff's entire property was taken no question of consequential damage was involved. The title of the defendant-in-error to the real property requisitioned was admitted, with the exception of the property comprised within the lines of proposed 61st, 62nd and 63rd Streets, extending from the westerly side of First Avenue to the high water mark, the title to which was claimed by the United States to be in the City of New York, (Stipulation, Exhibit W, Record, p. 309.)

The case was tried by the court without a jury, a stipulation waiving a jury having been signed by all of the parties and filed with the clerk pursuant to Sections 649 and 700, Revised Statutes. The court made special findings of fact and conclusions of law, in which it found that the value of the property requisitioned at the time of the appropriation thereof was $3,428,644, which was at the rate of $2.00 per square foot.

The United States submitted proposed findings conceding judgment against it for the unpaid balance of

the award, $440,126.55, with interest thereon from April 6th, 1918, to July 11th, 1919, the date of payment of the seventy-five percent. (Proposed Findings of Fact No. 8, Record, p. 281, fol. 449.)

The court found:

> "That just compensation herein for the taking and appropriation of said property hereinbefore described by the United States of America for public use is the sum of $3,428,644, with interest thereon at the rate of 6% per annum from the date of appropriation and dispossession of the owner therefrom." (Finding of Fact No. 13, Record, p. 274, fol. 435.)

The remaining findings of fact, numbered 17 to 21, Record, p. 275, 276, contain the necessary computations of interest and subtractions of the amount already received to arrive at the amount which, added to the amount already received, will be just compensation.

On January 5th, 1921, the court entered judgment against the United States for $2,439,474.17. Of this amount $358,266.82 was interest at 6%, the legal rate in New York, from April 6th, 1918, and May 31, 1918, upon the unpaid value of the property requisitioned respectively on those dates to the date of entry of judgment.

Statement of the Case Between the Defendant-in-Error and the City of New York.

The War Department Board of Appraisers had refused to allow compensation to the Langley Estate for 81,120 square feet of land comprised within the projected lines of proposed 61st, 62nd and 63rd Streets from First Avenue to the high water mark of New York Bay. This refusal was based upon the ground that the property had been conveyed by the Langley Estate to

the City of New York by deed dated April 25, 1899, and was owned by the City of New York in trust for street purposes. The plaintiff claimed that this deed was absolutely void and conveyed no title.

By stipulation between the defendant-in-error and the United States, the title of the Langley Estate was admitted except for the real property comprised in the beds of 61st, 62nd and 63rd Streets "extending from the westerly side of First Avenue to high water mark." (Plaintiff's Ex. W, Stip., Record, p. 309.)

It was further stipulated by the City and the United States that the area in dispute at the time of the taking was 81,120 square feet (Stipulation, United States, Exhibit 1, Record, p. 309).

The City of New York was made a party defendant by order dated October 31, 1919, upon motion of the United States Attorney. (Record, p. 15.) This was for the sole purpose of binding the City of New York by adjudication to be made by the court upon the question of title. An amended complaint was served, alleging that the City claimed an adverse interest to that of the Langley Estate and stating that no personal claim was made against the City of New York (Amended Complaint, Record, fol. 38).

The City, in its answer, claimed title to the beds of the streets referred to as far as "the New York Bay" of 81,120 square feet, and demanded that the complaint be dismissed and such other relief as might seem just. (Answer, Record, p. 79.)

At the trial the plaintiff offered in evidence an award of the War Department Board of Appraisers to the City of New York in order to prove that the United States of America had already made compensation to the City for adjoining property of the City requisitioned at the same time, including any

interest in these streets, and that the City had no claim to any compensation in this action. The City objected and the offer was thereupon withdrawn upon the concession of the City that it was entitled to no relief and claimed none in this action. (Record, fol. 86.) The City offered no proof as to value.

The court reserved decision upon the question of title, (fol. 72) with the understanding that it was to be briefed later, and permitted the introduction of testimony upon the question of value upon both theories of ownership.

All of the witnesses for both the Langley Estate and for the United States of America testified that the property of the estate had the same market value in either instance; that if the streets were owned by the City of New York in trust for street purposes the balance of the property of the estate would be worth so much more; that if they were owned by the Langley Estate they were worth as much as any other part of the property and would be necessarily used for purposes of access to the water.

The court held in its opinion (See opinion, Record, fol. 63, 270 Fed. 267), that the deed was a conveyance in contravention of the trust by the trustees, and therefore absolutely void by the express provisions of §105 of the Real Property Law of New York, *but that the dispute was entirely immaterial upon the question of just compensation*; and made a special finding of fact, that the value of the plaintiff's property at the time of the taking was $3,428,644,

> **"whether or not the City of New York held title to the lands within the proposed limits of 61st, 62nd and 63rd Streets if projected from the westerly line of First Avenue to New York Bay in trust for street purposes."** (Finding of Fact No. 17, Record, p. 319, fol. 529.)

Subsequent to this decision the City of New York moved for the first time to amend its answer so as to claim title to the proposed streets, not only to the high water mark, but nearly 1,500 feet further out into the Bay to the pierhead line approved by the Secretary of War in 1890. (See motion to amend, Record, p. 269.) This motion to amend was denied, (fol. 425). In spite of its denial the City argues the cause as if the motion had been granted.

The Decision of the Circuit Court of Appeals.

Both the United States and the City of New York sued out writs of error to the United States Circuit Court of Appeals for the Second Circuit.

The government argued that the streets belonged to the City and that the judgment was excessive by $162,240. The City urged that the complaint should have been dismissed, while the defendant-in-error claimed that the evidence supported the findings and the findings supported the judgment, and that the City had no right to review the judgment as it was not aggrieved by it.

The court held that the evidence supported the findings and that interest was allowable upon the value of the property from the date of its requisition (280 Fed. 76).

The court, however, held that the deed of 1899 from the trustees of the Langley Estate to the City was valid, and refused to approve the finding that the value of the property was the same whether or not the City held the title to the streets in trust for street purposes. The court stated that inasmuch as the valuation of the property was a mere matter of computation at $2 per square foot, it was obvious that the judgment was excessive so far as 81,120 square feet involved in the streets was

concerned. But instead of ordering a remittitur of that amount to the United States, the court ordered an assignment by the Langley Estate to the City of New York of $162,240 of the judgment, with interest, arrived at by taking 81,120 square feet at $2 per square foot. The court stated that upon the filing of such an assignment the judgment would be affirmed.

Thereafter and within the time provided, the Langley Estate executed and filed an assignment of $162,240 of the judgment with interest, in compliance with the above decision. The assignment contains the following condition:

> **"Provided, however, that should the Supreme Court of the United States upon review of this cause determine that the decision of this Court in requiring the assignor hereunder to execute and file this assignment, be erroneous for any reason, then this assignment shall be null and void."** (Assignment, Record, p. 334, fol. 554.)

Thereafter the judgment was affirmed with interest (Judgment of affirmance fol. 556) and the United States of America and the City of New York brought the cause to this court upon writs of error.

Outline of the Argument.

The government's assignment of errors does not present the question of the right to interest for review.

The district court first determined the market value of the property as of the time of its seizure, and found as a fact that just compensation included interest thereon from the date of dispossession and ouster of the owner. Interest is a part of just compensation and is admitted to be such a part of just compensation by

the United States in conceding interest at 5% upon the award made by the President. The requisition and determination of the amount of just compensation by the President and the action in the district court by dissatisfied property owners are all parts of a proceeding in eminent domain instituted by the government. The rules for the determination of just compensation are the same whether a proceeding in eminent domain is begun by administrative order and seizure, as in the case at bar, or in the case of condemnation proceedings instituted by judicial decree. Interest, if allowable at all, should be allowed at 6% per annum, which is the legal rate in New York.

The Circuit Court of Appeals erred in requiring the plaintiff to execute to the City of New York the assignment of $162,240 of the judgment. The assignment, which is conditional upon its being affirmed in this court, permits the plaintiff to raise this question. The action of the court was erroneous (a) because the City had stipulated that it was entitled to no relief in this action and could obtain none, (b) because the title to the disputed streets under New York law was in the trustees and not in the City of New York, and (c) because the dispute as to title was found to be wholly immaterial upon the question of value.

The City's assignment of errors in the court below presented no claim to any part of the judgment and the action of that court in ordering the assignment was a plain error which may be remedied here.

The trial court denied a motion of the City made after the trial to amend its answer claiming to the pierhead line instead of highwater mark and that order may not be reviewed. The deed and map attached thereto show unmistakably that the City's claim is unfounded.

ARGUMENT.

POINT I.

The only question raised by the United States is the right to interest and the assignments of error of the United States do not present that question for review.

Neither the bill of exceptions nor the assignments of error in the circuit court nor this court preserved for review any ruling of the trial judge during the progress of the trial upon this precise point.

There are general exceptions to findings of fact Nos. 13, 17 to 21 as to market value, and in which interest is calculated and allowed, but these exceptions apply presumably to findings as to the market value of the property.

The exception to the finding (No. 13, fol. 435) that just compensation was the sum of $3,428,644, with interest thereon at the rate of 6% per annum from the date of dispossession of the owner, was simply that there was no evidence to sustain the same (Exceptions No. 5, fol. 463).

Surely this objection and exception did not present to the mind of the trial judge any claim that he could not allow interest as a part of just compensation.

On the other hand the government proposed a finding to the effect that interest from April 6, 1918, was due on the unpaid balance of the award made by the War Department which the government urged the court to adopt as the amount of just compensation due. (See proposed finding No. 8, fol. 448.)

The record shows that the entire dispute was as to the market value of the property at the time of the taking, and no where was there any ruling or exception upon the allowance of interest upon which an assignment of error could be based.

The assignments of error to the Circuit Court of Appeals did not specifically present this point as error (assignments of error, fols. 477-492).

This court has held that, in reviewing a judgment of the Circuit Court of Appeals, the only assignments of error open here are the ones urged in that court.

United States v. *Rogers*, 255 U. S. 163, p. 168.

The assignments of error to this court likewise fail to present the point (assignments of error, fols. 561-562).

POINT II.

Just compensation in this case must include interest upon the value of the property at the time of the taking from the dates of the actual appropriation thereof to the date of payment therefor.

Sec. 10 of the Lever Act provides that the President shall ascertain and pay *just compensation*, and the district court is authorized to enter judgment for such amount, which added to the amount already received, will constitute *just compensation* to the property owner.

The Fifth Amendment to the Constitution of the United States provides that private property shall not be taken for public use without *just compensation*. This court has repeatedly held that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments.

Ex Parte Milligan, 4 Wall. 2, 121-127.
United States v. *Joint Traffic Assn.*, 171 U. S. 505, 571.
McCray v. *United States*, 195 U. S. 27, 61.

United States v. *Cress*, 243 U. S. 316, 326.
Hamilton v. *Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 156.
United States v. *Cohen Grocery Co.*, 255 U. S. 81, 88.

The obligation and pledge of the United States to make just compensation, therefore, is the same in war as in peace.

Interest was specifically demanded in the complaint (fol. 38).

The owner was actually dispossessed and ousted from his property and his property requisitioned by the United States on April 6, and May 31, 1918 (findings, 5 and 6, fol. 431; finding 14, fol. 435). Interest has been carefully computed upon the value of the property seized on each date (findings No. 14, fol. 435; No. 19, fol. 437).

(1) The trial court found as a fact that interest must be included to make just compensation.

The district court found that the market value of the property at the time of appropriation was $3,428,644 (finding of fact No. 12, fol. 434); that just compensation for its taking was the sum of $3,428,644 with interest thereon at the rate of 6% per annum from the date of appropriation and dispossession of the owner therefrom (finding of fact No. 13, fol. 435). In the remaining findings the court calculates the specific amounts of interest from the respective dates of the taking to the date of the entry of judgment (findings of fact Nos. 19 and 20, fols. 435-437) and then finds that the total amount to be added to the seventy-five percent of the award already received

which will be just compensation is the sum of $2,439,474.17 (finding of fact No. 21, fol. 437).

These findings of fact upon the amount of just compensation, in an action at law where a jury has been waived, are conclusive, if there is any evidence to sustain them.

Norris v. *Jackson*, 9 Wall 125.
The Francis Wright, 105 U. S. 381.
Stanley v. *Supervisors of Albany*, 121 U. S. 535.
St. Louis v. *Rutz*, 138 U. S. 226.
Grayson v. *Lynch*, 163 U. S. 468.
Dooley v. *Pease*, 180 U. S. 126.
Ward v. *Joslin*, 186 U. S. 142.
United States v. *United States Fidelity & Guaranty Co.*, 236 U. S. 514.

The United States now urges that the property owner is not entitled as a matter of law to the interest amounting in all to $358,226.82 accruing on the value of the property between the time of its appropriation and the entry of the judgment (findings of fact No. 19 and 20, fols. 437-438), which was found by the court below as a fact to be an integral part of just compensation. To deprive the property owner of $358,226.82 interest would be to lessen and diminish by that amount the just compensation to which he is entitled. There is no question presented as to whether the finding of the court or the verdict of a jury were intended to include interest, or as to the power of the court to add interest as a matter of law to the verdict of a jury. The question is purely one of fact, and the finding as to what constitutes just compensation is conclusive.

(2) The United States has conceded that interest is a necessary part of just compensation.

The President, through his agents the War Department Board of Appraisers, awarded to the Langley Estate as just compensation the sum of $1,796,522.20 with interest thereon at the rate of 5% per annum from May 1, 1918, to the date of the voucher for final payment. (finding of fact No. 7, fol. 432.) The President himself therefore, under the powers conferred by Section 10 of the Lever Act, has established the precedent that just compensation for this property must include interest from the date of the appropriation thereof. The President, however, awarded interest only at the rate of 5% per annum, although the legal rate in New York is 6% per annum, and fixed May 1st as the date when interest began to run—possibly as an average between the respective dates of taking, April 6 and May 31, 1918.

At the conclusion of the trial the United States submitted a finding expressly admitting its liability for the unpaid portions of the award and that the plaintiff was entitled to interest thereon from the date of April 6, 1918, to July 11, 1919—the date when the payment of the award was made (proposed finding of fact No. 8, fol. 449); and that plaintiff was entitled to judgment for $471,581.83. (proposed finding of fact No. 9, fol. 499). It therefore appears that the President conceded that interest at 5% from May 1, 1918, was a part of just compensation; that the United States in the court below conceded that it should begin on April 6, 1918, the date of appropriation, instead of on May 1, 1918, as fixed by the President, and we further claim that interest on the unpaid balance of the award has been calculated at 6% in the proposed finding, thereby conceding the liability for interest at 6%, the legal rate in New York.

The President, therefore, charged with the duty of determining and paying just compensation, has determined that just compensation must include interest in this case. Where the meaning of a statute is doubtful, great weight should be given to the construction placed upon it by the department of the government charged with its execution.

United States v. *Hermanos*, 209 U. S. 339.
United States v. *Healey*, 160 U. S. 136.
Robertson v. *Downing*, 127 U. S. 607.

(3) Section 177 of the Judicial Code does not apply.

The United States argues that the allowance of interest is prohibited by §177 of the Judicial Code:

> "No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the court of claims, unless upon a contract expressly stipulating for the payment of interest."

This is an enactment without change of §1091 Revised Statutes. The principle in this statute has been applied also in many cases involving claims against the United States in other courts sitting in lieu of the court of claims.

The prohibition cannot apply because—

This action is not a claim in the court of claims or one of which that court would have jurisdiction.

United States v. *Pfitsch*, 256 U. S. 547.

The question of the right to interest was squarely presented in the *Pfitsch* case. Judge Grubb had allowed interest on the value of the drill taken from the date of

seizure to the entry of judgment. If an action under §10 of the Lever Act was a claim of which the court of claims had jurisdiction, an appeal lay directly to this court. (*Fritch* v. *U. S.* 248 U. S. 458.) Judge Smith in *Filbin Corp.* v. *U. S.*, 266 Fed. 911, had decided that such an action was but one part of a proceeding in eminent domain in which the claimant was entitled to a trial by jury.

This court in the *Pfitsch* case held that such an action was not a claim against the United States and neither the court of claims nor the district court sitting in lieu thereof, had jurisdiction thereof; that Congress had created a new and exclusive jurisdiction in the district courts in which the trial would be with a jury. Necessarily this opinion, citing Judge Smith's opinion leading him to his conclusion that the claimant was entitled to a trial with a jury, determined that the action was not an ordinary claim against the United States, to which the usual prohibition as to the allowance of interest in the absence of statutory authority would apply, but part of a proceeding in eminent domain instituted by the government.

(4) This action is merely one step in a proceeding in eminent domain instituted by the government in which just compensation is the issue and ultimate object.

It must be conceded that in condemnation proceedings instituted by the government the property owner may receive interest on the value of the property taken as part of just compensation.

United States v. *Rogers*, 255 U. S. 163,
United States v. *Highsmith*, 255 U. S. 170.
United States v. *Sargent*, 162 Fed. 81.

In *United States* v. *Rogers* (*supra*), this court distinguished between a claim against the United States and a proceeding in eminent domain as follows (p. 169):

> "It is unquestionably true that the United States, upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. *United States ex rel Angarica* v. *Bayard*, 127 U. S. 251, 260, 32 L. Ed. 159, 162, 8 Sup. Ct. Rep. 1156; *United States* v. *North Carolina*, 136 U. S. 211, 216, 34 L. ed. 336, 338, 10 Sup. Ct. Rep. 920, cited and approved in *National Home* v. *Parrish*, 229 U. S. 494, 496, 57 L. ed. 1296, 1298, 33 Sup. Ct. Rep. 944. In the present case the land owners did not sue upon a claim against the government, as was the fact in *United States* v. *North American Transp. & Trading Corp.*, 253 U. S. 330, 64 L. ed. 935, 40 Supt. Ct. Rep. 518. The government was seeking, for purposes authorized by statute, to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.
>
> "Having taken the lands of the defendants in error, it was the duty of the government to make just compensation as of the time when the owners were deprived of their property. *Monongahela Nav. Co.* v. *U. S.* 148 U. S. 312, 341, 37 L. ed. 463, 373, 13 Sup. Ct. Rep. 622.
>
> "In fixing the compensation the district court, and the circuit court of appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 per cent. This was in conformity with a former ruling of the circuit

court of appeals applying the statutes of Minnesota to lands appropriated in that state. *United States* v. *Sargent*, 89 C. C. A. 81, 162 Fed. 81.

"The government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. The fact that the rule is in harmony with the policy of the state where the lands are situated does not militate against, but makes for the justice and propriety of its adoption, *United States* v. *Sargent, supra.*"

In the *Sargent* case, cited and approved, the government brought proceedings in Minnesota, where the statutes provide for fixing of just compensation by commissioners in the first instance, with provision that either party might appeal, if dissatisfied, to obtain a judicial review of the award and for the hearing of the appeal by the court after the framing of the issues and the reassessment of the damages as justice might require. The court held that the payment of interest was not one of the modes of proceeding which was made compulsory upon courts of the United States by the conformity statute, but that it was satisfied to conform to it as a palpably fair and reasonable method of performing the indispensable condition of the right of eminent domain, namely of making just compensation for the land as it stood at the time of taking.

The United States relies upon *United States* v. *North American Transport & Trading Co.*, 253 U. S. 330. In that case certain lands in Alaska had been taken by the United States and the claimant brought action in the court of claims for the value of the property and also for a sum equivalent to the value of the use and occupation of the property from the time of the taking to the entry of judgment. The property had been taken under a statute which authorized the Secretary of War to acquire property and although the original taking had been tortious it had been subsequently ratified by the Secretary of War. The claimant urged that the value of the use and occupation should be awarded since it was but the equivalent of interest upon the value of the property taken. This court reviewed the previous decisions and said that the right to bring suit in the court of claims were not founded upon the Fifth Amendment, but was merely an action upon an implied contract by the United States to pay for property requisitioned. The case was not a proceeding in eminent domain and the opinion of this court emphasizes the distinction clearly. The opinion taken together with *United States* v. *Rogers* which was decided subsequently by this court, is convincing authority to the effect that in proceedings by eminent domain the ordinary principle prohibiting interest does not apply.

This court said (p. 337):

> "This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as part of the just compensation in condemnation proceedings brought by the

government. For, as suggested in *United States* v. *Sargent*, 162 Fed. 81, such a proceeding is not a suit by the landowner to collect a claim against the United States, but an adversary proceeding in which the owner is the defendant, and which the government institutes in order to secure title to land. (*Mason City Ft. D. R. Co.* v. *Boynton*, 204 U. S. 570.) On the other hand, this suit brought in the court of claims, is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking."

The claimant in that case had delayed the filing of suit for nearly six years after the taking, and many years had been consumed in the course of litigation, so that there was no default in payment which could be attributed to the United States. Interest in such a case would be damages for delay in payment. In this case it is part of the compensation necessary to make the owner whole. Suit was brought within two months after payment of 75% of the award.

Is this action, therefore, a claim upon an implied contract of the United States, or is it part of a "compensation proceeding" to which the ordinary rule as to interest does not apply?

The great weight of authority in the lower courts is that an action under §10 of the Lever Act is part of a proceeding in eminent domain instituted by the government, in which interest is allowable as a part of just compensation.

Grubb, *District Judge, in Pfitsch* v. *U. S.*, appeal dismissed, 256 U. S. 547.

Garvin, *District Judge, Benedict* v. *U. S.*, 270 Fed. 267.

Smith, *District Judge, Filbin Corp.* v. *U. S.*, 265 Fed. 354; *Seaboard Air Line* v. *U. S.*, reversed 280 Fed., 349.

Hough, Manton and Mayer, *Circuit Judges, U. S.* v. *Benedict*, 280 Fed. 76.

Woods, *Circuit Judge*, dissenting in *U. S.* v. *Seaboard Air Line*, 280 Fed., 349.

Chatfield, *District Judge, Prince Line* v. *U. S.*, 283 Fed. 535.

Contra—Waddell, *Circuit Judge*, Webb, *District Judge, U. S.* v. *Seaboard Air Line*, 280 Fed. 349.

In *Filbin Corp.* v. *U. S.*, 265 Fed. 354, cited by this court in *Pfitsch* v. *U. S.*, 256 U. S., p. 549, Judge Smith in very apt language pointed out the difference between a claim against the United States and this action as follows:

> "The taking and the method to ascertain the compensation are a part of the process of condemnation, being a particular method of condemnation provided by the Legislature under the exigencies of the case. The proceeding is in reality begun by the requisition. The application to have the compensation fixed is a part of that proceeding, necessarily subsequent, as depending upon the fact whether or not the owner of the property might agree to the sum fixed by the President as just compensation. If he so accepted it, there was no necessity for any further proceeding. If he were dissatisfied with it, then the expression

of his dissatisfaction, and the means taken to have it determined, were all a part of the condemnation as a whole.

"This proceeding, under Section 10, is not an original suit against the United States, to institute which needed express legislative permission. It is a part of the proceeding for condemnation originally instituted by the United States itself, and in which the United States is the actor; this being only the defensive answer of the property holder to assert his right to just compensation. No other interpretation consistent with the Constitution appears a reasonable one.

"The privilege given in the act for a party to sue the United States is not a privilege given to sue the United States in matters in which that privilege never theretofore existed. It is given as a part of the process of condemnation, without which title to the property could not be acquired by the governing body for public purposes. It does not come within the purview and scope of the general class of claims against the United States, resulting under contracts, or for damages for the unauthorized acts of its officers, who may be personally responsible, but for which the United States could not be sued without its consent."

The majority opinion in the *Seaboard* case (280 Fed. 349) sustains the government's contentions, but the views of these two judges and also of the judge in the Connecticut cases are opposed by the views of eight judges who have decided the point. The court held that the action was not a condemnation proceeding, and that even in a condemnation proceeding the right to in-

terest would be doubtful independent of the conformity provisions and a state statute permitting interest.

The fallacy of this opinion lies in the fact that the court regards condemnation proceedings instituted by judicial decree as the only method by which the sovereign right of eminent domain may be exercised so as to entitle the property owner to all elements of just compensation.

The government seeks to avoid the effect of the practical construction given to the statute by the President in awarding interest upon the value of the property and at the same time bring the case within the *North American* case by arguing that the procedure in the Lever Act is divisible into two parts and seeks to differentiate that part of the statute providing for the ascertainment of just compensation by the President from the latter part permitting a dissatisfied property owner to sue in the district court for just compensation. The government admits that the first part of the statute is a proceeding in eminent domain, but argues that the latter part involves only the presentation of a claim against the United States. The statement of this very argument shows its weakness.

The action of the owner in refusing to accept the award made by the President (in this case about half the real value of the property) and in instituting this action, seems to be regarded by the government as something reprehensible, which would subject the owner to the ordinary trials and delays and rules of litigation of claims against the United States. The government urges that the owner has his election whether to accept interest upon a concededly inadequate award by the President or whether to reject the award and obtain the market value of the property without interest. The owner, however, was no more forced to make such an

election in the procedure adopted by the Lever Act than he is by the existing similar procedure in many states by which either party dissatisfied with an award made by administrative officers may appeal for a judicial hearing and review.

The government concedes that some judicial proceeding in which the property owner may have an opportunity to present evidence and to be heard is essential to the exercise of power of eminent domain (see government brief, page 7). But the Lever Act provides for no such hearing or opportunity before the President. If the Act had stopped there, a property owner would have been forced to bring suit, in the court of claims, upon an implied contract as in the *North American* case or might have resisted the taking as illegal. But the Act went further and provided a full and complete opportunity for the owner to be heard and to present evidence in permitting the district courts to hear and to determine all these controversies. The only part of the statute which makes it a valid exercise, therefore, of the power of eminent domain and provides sure and certain compensation is that part providing for a court review. How illogical, therefore, to argue that the determination of the President *ex parte* is the real condemnation proceeding, but that the provision that the owner may sue the United States, if dissatisfied, is simply the presentation of a claim against the United States upon an implied contract.

Whether a condemnation statute permits the ascertainment of just compensation by the executive and provides that either party, if dissatisfied, may appeal or obtain a judicial review or places a burden upon the property owner of suing if dissatisfied, the court proceedings are surely an essential and integral part of the general scheme of condemnation.

(5) The obligation to make just compensation is the same whether the government institutes the court proceedings or forces the property owner to do so.

The power of eminent domain may be exercised either: (1) by administrative taking or seizure and a subsequent judicial proceeding to determine the amount of just compensation; or (2) by usual proceedings instituted by judicial decree where the compensation is first determined.

Mr. Nichols in his work on Eminent Domain, 2d Ed., Section 366 *et seq.* outlines the two distinct methods of procedure of taking land for public use and refers particularly to the taking by administrative order which has prevailed in Massachusetts and several other states since their earliest settlement. This procedure has the advantage of speed and will relieve the courts of controversy where land owners are satisfied with the awards determined *ex parte* by the condemning authority. It is, of course, essential to the validity of acts authorizing such procedure that provision be made for some judicial review and to insure certain and just compensation. Mr. Nichols says:

> "After the taking has been made the owners of the land taken are notified, and it devolves upon them, if dissatisfied with the award, to institute proceedings looking to a new award by a jury or other impartial tribunal. In such proceedings the land owner is actually as well as nominally petitioner or plaintiff and the corporation which made the taking is respondent or defendant. A personal judgment for the petitioner against the respondent is entered for the sum awarded in the same manner as a judgment in an action at common law, and as some provision for the certain payment of compensation is made before the taking is authorized, the owner event-

> ually receives his money, with interest from the day of the taking, although it may be long after he has been deprived of possession that he is paid."
>
> *Nichols on Eminent Domain,* 2d Ed., §369, p. 1016.

This method of procedure was adopted by Congress in §10 of the Lever Act under the necessity of speed in time of war, but the owner is entitled to the same compensation as if the government had brought the court proceeding instead of throwing the burden on him.

The Circuit Court of Appeals for the Second Circuit in this cause recognized that the difference in procedure had no effect upon the obligation to make just compensation as follows:

> "As to the interest, it is to be noted that the acquisition of property under the Lever Act is only a summary species of what are commonly called condemnation proceedings. The justification for any condemnation is the necessity of taking something from a private person for a public use; and the justification for the summary procedure of the act under consideration is the overwhelming necessity for speed under the dreadful pressure of war. But whether the taking be by familiar condemnation of peace or by the strong arm of a nation at war, the obligation upon the taker is always that recognized in this very statute, viz: to make 'just compensation' to the owner." (Opinion, Record, fols. 547-548, 280 Fed., p. 80.)

In his dissenting opinion in the *Seaboard* case Judge Woods said:

"Any proceeding prescribed or authorized by a state or the federal legislature to acquire land for public purposes and to ascertain just compensation for it is a condemnation proceeding; and every step taken in it from the beginning to the end is a part of the condemnation."

* * *

"The distinction that a land owner is entitled to interest when the government institutes the proceeding but is not entitled to it when the government forces him to institute it, is admittedly mounted on a technicality having no foundation in justice!" 280 Fed., 349.

Just compensation is always a judicial question.

Cooley Constitutional Limitation, (7th ed.) 817;
Matter of City of Buffalo, 139 N. Y. 422, 430;
Monongahela Nav. Co. v. *U. S.,* 148 U. S. 312.
National City Bank v. *U. S.,* 275 Fed. 855.

As stated in *Monongahela Navigation v. the United States,* 148 U. S. p. 327:

"The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered then the question of compensation is judicial."

In the same case this court quoted with approval the following extract from another opinion, p. 327:

"The right of the legislature of the state by law to apply the property of the citizen to a pub-

lic use and then to constitute itself the judge in its own case to determine what just compensation it ought to pay therefor or how much benefit it has conferred upon the citizen by thus taking his property without his consent or to extinguish any part of such compensation by prospective conjectual advantage or in *any manner* to interfere with the just powers and province of courts and juries in administering right and justice cannot for a moment be admitted or tolerated under our constitution.

"If anything can be clear and undeniable upon proof of natural practice or constitutional law, it seems that this must be so."

Congress may not, therefore, determine by statute what is just compensation. Nor may its amount be lessened or increased by the exercise by Congress of a choice of a mere method of procedure. Congress may not determine the amount of just compensasation in deciding whether the government shall institute the proceeding or whether it must be commenced by a dissatisfied land owner. It is unthinkable that the distinction pointed out by Judge Woods should be adopted as law. To let Congress prescribe the amount of just compensation by the choice of procedure would permit Congress indirectly to encroach upon the prerogatives of the judiciary.

When Congress had the Lever Act under consideration it was confronted with the alternative of either giving the President the power to seize the property required for governmental purposes forthwith, leaving the question of compensation to be determined in an action to be instituted by the owner in the court of claims on the theory of an implied promise to pay, or to institute con-

demnation proceedings which would take considerable time and which would delay the government in obtaining possession of the property in which condemnation proceeding the owner would have the use of his property until the amount of compensation was fixed and determined, and that amount with interest down to the time of payment paid to the owner.

Congress must have seen that the ordinary form of condemnation proceeding would not do, for the government was anxious to get immediate possession of the property and in time of war it would not do to wait for possession until the amount of compensation had been fixed and the amount paid with interest to the time of taking possession. On the other hand Congress apparently felt that it would be unfair to the owner of the property to forthwith take possession of the property, leaving the owner to his action for damages in the court of claims where he would only recover the value of the property years after the event.

Congress determined upon a procedure which would put the government into immediate possession of the property and provide for a method of ascertaining compensation in line with the procedure existing in some States, notably in the State of Massachusetts. And so Congress conceived of this form of condemnation procedure and provided that the President should have the power to seize and "shall ascertain and pay a just compensation therefor." Just how the President should ascertain and pay just compensation is not set forth in the statute. No opportunity for hearing or to present evidence was awarded the property owner, but just compensation was pledged. Congress knew that the amount of just compensation is always a question for the judiciary to determine, and therefore so provided in the Act. In doing so, Congress necessarily authorized the pay-

ment of interest where the court determines that interest must be paid as a part of just compensation.

The argument that just compensation may not include interest because the statute does not expressly authorize it by that name is beside the point. The entire question is not within the province of Congress to prohibit either in express terms or by implication, or by a mere choice of procedure.

(6) Just compensation by definition includes interest from the time of appropriation to the date of payment.

The Fifth Amendment to the Constitution and the Lever Act both guarantee just compensation. The Constitutions of New York State and of practically all the other states also guarantee just compensation to a property owner whose property is taken by eminent domain.

Under the law of the State of New York just compensation to be paid to a property owner where private property is taken for public purposes must include interest from the date of appropriation and of the exclusion of the owner from his property. The rule is set forth by Scott, *J.*, in *People* v. *Stillings*, 136 App. Div. 438, p. 441, affd. 198 N. Y. 504 on opinion below:

> "The theory of the law of condemnation is that payment for the land taken shall be coincident with the taking, and if for any reason payment is postponed the right to interest from the time that payment ought to have been made, follows as a strict constitutional right."

See also

Matter of Mayor, 40 App. Div. 281,
Matter of Minzesheimer, 144 App. Div. 576; affd. 204 N. Y. 272,
Matter of City of New York, 222 N. Y. 370.

This is the definition of just compensation adopted in practically every other State in the Union. There is some difference of opinion as to what constitutes an appropriation so as to set interest running, but all decisions agree that just compensation includes interest from the date when the owner is dispossessed.

Lewis on Eminent Domain, (3rd Ed.) § 742, p. 1319.

Nichols on Eminent Domain (2nd Ed.) § 216, p. 649.

20 *Corpus Juris,* 807, *et seq.,* and cases cited.

This is likewise the definition of just compensation in the Fifth Amendment.

Just compensation means a full and fair equivalent to be returned to the owner as of the time when the owner is deprived of his property.

Monongahela Navigation Co. v. *United States,* 148 U. S. 312.

The plaintiffs' property was worth $3,428,644 in 1918. Payment in full has not yet been made and may not be made for years. The property was held in trust during the life of life tenant with remainder to the grandchildren of testator. Payment of $3,428,644 would represent and restore to the estate only the principal thereof of 1918. If interest is not paid, is it not clear that the life estate has been confiscated without any compensation? No better example could be obtained of the necessity of determining that interest is a necessary part of just compensation.

It is obvious that if it is the government's duty to make compensation as of the time of the taking, and payment of compensation is long delayed, interest is payable, not as damages or penalty due because of any

default in payment but as an element necessary to make the owner's loss whole. So therefore we find this Court has held:

> "We agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled."
>
> *United States* v. *Rogers*, 255 U. S. 163, p. 168; *United States* v. *Sargent*, 162 Fed. 81.

Just compensation must include a sum equivalent to interest as a matter of law where the court or jury determines the value of the property as of the time of its seizure *United States* v. *Highsmith*, 255 U. S. 170.

(7) The requirement as to just compensation will not be satisfied unless this Court directs that interest be paid on the judgment itself.

A general immunity of payment of interest on claims and judgments as damages generally cannot deprive the Courts of the power to require interest on the judgment in this action.

In *United States* v. *Rogers* (*supra*) this court held that interest was payable on an award for property *"from the time of taking until payment,"* and we have, we believe, successfully demonstrated that this proceeding is governed by the same rule.

The Government refused to pay interest on the judgment itself in the *Pfitsch* case, and asserts generally the doctrine that interest does not run on judgments against the United States.

It is obvious that if interest runs at all, it runs until payment. The Circuit Court of Appeals affirmed the judgment with interest. No question is made however

in the assignment of error of the correctness of the affirmance with interest, nor is the point raised by the brief. We refer to the matter, however, so that the plaintiff's position will be clearly understood.

POINT III.

The Circuit Court of Appeals erred in requiring the Langley Estate to execute an assignment of $162,240 of the judgment to the City of New York and the assignment should be declared null and void.

In compliance with the decision of the Circuit Court of Appeals and in preference to recourse to a new trial and the prolongation of an already lengthy and expensive litigation, the Langley Estate executed and filed a conditional assignment by way of a remittitur of $162,240 of the judgment to the City of New York.

We concede at once that ordinarily the filing of a remittitur would be a waiver of our right to complain of the decision of the Circuit Court of Appeals.

> *Koenigsberger* v. *Richmond Silver Mining Co.*, 158 U. S., 41, 43.
> *Hansen* v. *Boyd*, 161 U. S. 411.

The situation here is very different, however, from that ordinarily involved in the filing of a remittitur. The United States claimed in the Circuit Court of Appeals that the streets belonged to the City, that the judgment was excessive by $162,240. The City claims that the assignment was correctly ordered and even asks that more of the judgment be assigned to it. It seemed inevitable that the correctness of the decision of the Circuit Court of Appeals in ordering the assignment would necessarily be examined in any review of the cause in this court.

With that full understanding and with the obvious desire that the correctness of its rulings should be open for examination in this court and that the assignment should not be valid if this court disagreed, the Circuit Court of Appeals accepted an assignment from the Langley Estate to the City as a compliance with its decision, which contained the following condition:

> "Provided, however, that should the Supreme Court of the United States upon review of this cause determine that the decision of this court in requiring the assignor hereunder to execute and file this assignment, be erroneous for any reason, then this assignment shall be null and void." (Assignment, Record, p. 334, fol. 554.)

The conditional form of the assignment by way of remittitur and the fact that the City challenges its correctness as not going far enough, necessarily brings the assignment before this court for review.

(a) It was conceded upon the trial that the City asked for no relief and could obtain none in this action.

The action of the Circuit Court of Appeals in ordering an assignment of $162,240 of the judgment by the plaintiff to the City of New York was a complete surprise to all the counsel in the cause. No one had anticipated that the City was entitled to any portion of the judgment and the question of the City's right to any affirmative relief was not argued in the Circuit Court of Appeals.

The United States Government had requisitioned simultaneously with the property of the Langley Estate property adjoining belonging to the City of New York and an award to the City for its property which included any interest it had in 61st, 62nd and 63rd

Streets had been made. Upon the trial of the action the plaintiff offered in evidence that award (No. 591) made by the War Department Board of Appraisers to the City of New York, for the purpose of showing that the City had been compensated already for any interest it claimed in these disputed streets:

> **"Mr. Riggs: I offer in evidence award made by the War Department Board of Appraisers to the City of New York, dated June 25th, 1919, No. 591."**
>
> **Mr. Kenney (for the City of New York): Objected to. We have not asked for any relief and we cannot get it in this proceeding."**
>
> **"Mr. Riggs: I will withdraw the offer of the award No. 591 upon that stipulation."** (Record, fol. 86.)

But, in spite of this stipulation that it was entitled to no relief, the City has now been awarded a substantial part of the judgment in this action. It is only fair to state, however, that this was not brought to the attention of the Circuit Court of Appeals because no one of the counsel, including the Corporation Counsel for the City, had ever suggested in his brief or in the argument that the City was entitled to any portion of the judgment or entitled to any relief except that the complaint against it be dismissed. The point was not argued nor discussed, as all of the counsel knew of the stipulation.

The assignment of error of the City to the Circuit Court did not claim the right to any part of the judgment but only that the City was entitled to judgment dismissing the complaint (fol. 404).

The award No. 591 to the City has been rejected by the City and since the decision of the Circuit Court of Appeals and the filing of the assignment, the City has also commenced an action in the District Court for

the Eastern District of New York against the government for just compensation for its property in these identical streets. We believe the court may take judicial notice of this action (*Butler* v. *Eaton*, 141 U. S., 240) and application will be made on the argument to submit the City's complaint (*Dakota County* v. *Glidden*, 113 U. S. 222). If the Circuit Court of Appeals is correct the City will receive a substantial portion of the judgment in this action; it will also be compensated in its own action for its interest in the streets, if any, so that the action of the Circuit Court of Appeals may result in the City being paid twice for the same property. Moreover, the action of the Circuit Court of Appeals determines that property held in trust by the City of New York for street purposes has a substantial market value, when the Court of Appeals of the State of New York has determined, as a matter of law, that property within the lines of a street burdened with a trust for street purposes and disassociated and disconnected from any adjoining property as was this property, is of nominal value.

Matter of City of New York, 196 N. Y., 286,

Obviously, any dispute as to the value of the streets when owned by the City of New York in trust for street purposes should have been left for determination in the City's action against the United States.

The City having stipulated that it was entitled to no relief in this action, and having induced the defendant-in-error by that stipulation to withdraw evidence designed to show that it had already been compensated for its interest in these streets and having no assignment of error except that the complaint should have been dismissed, is urging its claim to sustain the assignment, and even carry it further, in violation of fundamental professional ethics, and is estopped from

asserting any claim to a portion of the judgment in this action.

(b) The Circuit Court of Appeals erred in ordering the assignment to the city to be executed because the market value of the property taken was the same even if the city held title to the disputed streets in trust for street purposes; and defendant-in-error was entitled to all of the judgment.

The issue of title between the Langley Estate and the City of New York was first tried and when the deed from the estate to the City was offered in evidence it was objected to upon the ground that it was void in law. The court thereupon stated that he would receive the deed in evidence and receive briefs later as to its validity. The deed was thereupon received in evidence "with the understanding that the question with respect to the title conveyed by it is to be discussed by counsel" (fol. 72).

The trial on the question of value with the United States then proceeded and the expert witnesses called on behalf of the estate testified upon both theories of ownership of the disputed 81, 120 sq. ft., as follows:

> "Graham—Q. Now assuming, Mr. Graham, that at the time of the requisition by the United States Government the land comprised within the beds of 61st, 62nd and 63rd Streets was owned by the City of New York from First Avenue to the then existing high water mark for street purposes, what was the value of the property requisitioned by the United States Government?
>
> "A. The same, (*i. e.*, Three million four hundred twenty-eight thousand six hundred forty-three dollars and eighty cents). (fol. 110.)
>
> "Porter—Q. Now assuming Mr. Porter, that the title to 61st, 62nd and 63rd Streets from the

westerly side of First Avenue to the high water mark was in the City of New York on that date, what, in your opinion, was the market value of the property of the Langley Estate?

"A. Three million four hundred and twenty-eight thousand six hundred and forty-four dollars.

"Q. That is the same?

"A. Exactly (fol. 158).

"Farley—Q. If the title to 61st, 62nd and 63rd Streets from the westerly side of First Avenue to the high water mark was in the City of New York on the date I have mentioned, what, in your opinion, was the market value of the property?

"A. Three million eight hundred and fifty-seven thousand two hundred twenty-four dollars.

"Q. That is the same.

"A. Yes, sir (fol. 213).

"Pounds—Q. Did I also ask you to make an appraisal of the property upon the assumption that the title to the streets from the westerly side of First Avenue to the existing high water mark as of April, 1918, was in the City of New of 61st, 62nd and 63rd Streets?

"A. You asked a figure both ways.

"Q. What in your opinion was the value of the property upon the assumption that those streets I have enumerated belonged to the City of New York in 1918?

"A. The same as the figure just given (fol. 289."

These expert witnesses for the plaintiff were vigorously cross-examined with reference to this opinion and stated in substance that if the property belonged to the City of New York in trust for street purposes the value

of the lands in the streets would be reflected back into the balance of the property owned by the trustees abutting upon the streets; that the property within the streets would necessarily be dedicated by the Langley Estate for the purposes of access to the water, when a time for improvement of the property arrived.

When the government witnesses testified they also agreed with this opinion:

> "Morrissey—Q. In making your estimate of value, will you tell me whether or not that estimate as to the value of the property would be changed if you assumed the City had the title to 61st, 62nd and 63rd Streets, as the beds of them would be carried out to the high water mark?
>
> "A. It would not.
>
> "Q. And that would include 81,120 square feet.
>
> "A. Yes, sir.
>
> "Q. The value, you say, would still be the same.
>
> "A. Yes (fol. 325).
>
> "Hovenden—Q. If it should appear, Mr. Hovenden, that the City had the right to the bed of 62nd and 63rd Streets, extending from the west side of First Avenue to the high water mark, and that the area contained in the beds in the streets as so laid out, amounting to 81,120 square feet, would that, in your opinion, change the value of this Langley property?
>
> "A. It would not.
>
> "Q. You would still say that the value which you placed on it——
>
> "A. Would be reflected back into the balance of the land" (fol. 357).

Counsel for the defendant-in-error thereupon called the court's attention to the fact that all the experts agreed upon this point and that "inasmuch as the experts testified for both sides and that as it was apparent that the City had been compensated for whatever interest it had, that the question of title need not be determined" (fol. 358). Again, at the end of the case the court suggested:

> "The Court—Why not give the City title to this property? I think I shall do so unless some strong reason is advanced why I should not" (fol. 419).

In the court's opinion he holds, as a matter of law, that the deed was void and expressly states with reference to the dispute of title: "The determination of this dispute does not affect the value of the plaintiff's property. All parties agree that if the City owns these streets the opening thereof would be reflected in the value of the land adjoining; if the Langley Estate is held to be the owner it would use the land in the proposed street for access to the water front upon the improvement of the property" (fol. 61, 270 Fed., p. 268).

In order to make it clear that the dispute as to title was immaterial upon the question of value, the court also found "that the fair and reasonable market value of said property for public purposes at the time of such requisition was Three million four hundred twenty-eight thousand six hundred and forty-four dollars ($3,428,644) whether or not the City of New York held title to the lands within the proposed limits of 61st, 62nd and 63rd Streets projected from the westerly line of First Avenue to New York Bay in trust for street

purposes" (finding of fact No. 17, record, p. 275, fol. 436).

Throughout the trial and in the finding it was understood perfectly that the finding referred to the conditions as they actually existed at the time of the requisitioning of the property. The dispute indeed affected only 81,120 square feet out of 1,714,322 square feet requisitioned, a little less than 5% of the entire property.

The Circuit Court of Appeals refused to follow this finding, stating in substance that the finding meant that if and when the streets were opened the abutting property would, by reason of the streets, be worth an additional sum equal to the value of the land appropriated for highway property; but that as no streets had been opened the Langley Estate was being compensated upon the basis of conditions which did not exist, and the court said: "That it is held in trust for a public purpose does not in any way change its market value and the City has been as much deprived of what it owned as was the Langley Estate" (fol. 552). This is not correct. The expert witnesses all agreed that the mere holding of title to the property by the City in trust for street purposes was the condition upon which they based their opinion. Nothing whatever was said about the actual opening of streets or their being paved or guttered.

The fundamental error in the opinion of the court below lies in disregarding the fact that the streets, if owned by the City of New York in trust for street purposes could be used only for a special limited purpose, and had only a nominal value.

Matter of the City of New York, 196 N. Y., 286.

If the City owns property in trust which it may use for no other purpose than a street, and particularly property on which it has never expended anything for sewers, paving, gutters or other improvements, its damage is merely nominal when the property is taken for superior public purposes. It can only be used for purposes of a street, while as long as the land was owned by the Langley Estate it could be used for any purpose and was as valuable as any other portion of the premises. When owned by the Langley Estate it had a market value of $2.00 per square foot. As soon as it was conveyed to the City its market value to the City of New York was, under the law of New York nominal. What became of the difference between its original value when owned by the Langley Estate in fee and nominal value as held in trust by the City? Surely, it was reflected into the balance of the property owned by the Langley Estate.

The theory of the expert witnesses for both the plaintiff and the government was, therefore, correct, and not based upon any state of facts other than the mere ownership of the disputed property in trust for street purposes by the City.

It is apparent that the City's claim to the streets could be sustained, and the complaint against it dismissed and at the same time the judgment in favor of defendant-in-error affirmed in its entirety.

If, however, the Circuit Court's opinion is correct a remittitur of $162,240 of the payment to the United States should have been ordered, and the City left to its remedy in an action when the value could be determined by proof.

C The Circuit Court erred in requiring the execution of the assignment, for the quit claim deed of the trustees of the Langley Estate to the City of New York of April 25, 1899, was not

authorized by the power of sale in the will and was absolutely void as in contravention of the trust.

The validity of the deed depends entirely, of course, upon the local law of the State of New York. The President in awarding compensation had deducted 81,120 sq. ft. at $1.10 per square foot from the award. We claim that, if this deduction was correctly made, the deed was void for it conveyed part of the corpus of the trust in violation of the trustees' authority.

The will of William C. Langley gave to his trustees a power for sale expressed as follows:

> "I hereby authorize and empower my said executors and trustees and their successor and successors, to sell at their discretion as to the time and terms and at public or private sale, all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof." Will (fol. 533.)

The authorization is therefore "to sell" and the terms of the sale and time or whether the sale shall be at public or private sale are left to the discretion of the trustees. The testator obviously intended to clothe them with power to determine how much should be paid in cash or by purchase money mortgage, and the interest rate and maturity of any such mortgage. It was, however, nothing but a "sale" of real estate which he authorized.

The trustees held the property in trust, with remainder to the testator's grandchildren. The will clearly expressed the trust.

Section 105 of the Real Property Law of the State of New York was as follows:

> "If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust, except as provided in this section, shall be absolutely void."

The exception referred to in the remaining portions of the section is immaterial upon this question.

Every *sale, conveyance* or *act* of the trustees in contravention of the trust is declared absolutely *void,* not *voidable.* A conveyance in contravention of the trust confers no title upon the grantee. The grantee is deemed in law to possess knowledge of the terms of the trust where the trust is expressed in the instrument creating it and takes a conveyance from trustees at his peril.

William H. Langley, the life beneficiary, also a trustee, and Charles E. Goodrich, the other trustee, conveyed to the City of New York the lands comprised within the lines of certain projected streets to New York Bay. The consideration for the deed was:

> "That the consideration for such deed was the possible future exemption of the remainder of said property owned by the said trustees from assessment on any future proceedings by the City of New York for the opening of said streets; that the property within the limits of 61st, 62nd and 63rd Streets from the westerly line of First Avenue to New York Bay remained in the possession of the grantors; that such streets—61st, 62nd and 63rd were not opened by the City of New York" (finding of fact No. 16, fol. 436).

There was no sale, therefore, for cash or either part cash and part mortgage. There was no real considera-

tion for the deed for the streets were never opened by the City of New York so that an opportunity for exemption from assessment never arrived.

Section 992 of the Greater New York Charter provided as follows:

> "The owners of land and of all the estate herein embraced within the lines of any street laid down and shown on the map or plan of the City of New York, and comprising all the land within said lines in an entire block in extent, may, *without compensation*, and at their own expense, convey all their right, title and interest therein, providing the same shall be free from incumbrances inconsistent with the title to be acquired by the City, to the City of New York, and upon delivery of such conveyances to the corporation counsel of said city, with the money necessary to record such conveyances, and affidavits made by all such owners to the effect that the persons making them are the owners of the estates in such lands so conveyed by them, respectively, and stating their interests, and that such estates in such lands are free of all incumbrances, except as aforesaid, together with abstracts of title and complete searches if desired by such corporation counsel to examine such conveyances and papers, and if such title shall not be rejected for good cause, by such corporation counsel, he shall cause the said conveyance to be recorded in the office in which conveyances of real estate are recorded in the county in which such lands are located within sixty days after their delivery to him, and file them with the comptroller of such city, and thereupon the City of New York shall become vested

> with the title to said land to the same effect and extent as if they had been acquired by a proceeding taken for the opening of that portion of said streets; after the making and acceptance of such conveyances, no proceedings to open the lands so conveyed shall be taken or maintained, nor shall the lands fronting on that portion of the streets so conveyed, and extending to the centre of the block on either side of such portion of said street as conveyed, be chargeable with any portion of the expenses of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid."

In order, therefore, to authorize any exemption from assessment under that section the land conveyed to the City must (1) comprise an entire block in extent, (2) the conveyance must be without compensation, (3) the conveyance must be at the expense of the grantors, (4) the grantors must advance the necessary recording fees; and (5) the City of New York became vested with title of the land only to the same extent as if the streets had been acquired by a proceeding taken for their opening.

The trustees were not authorized to convey the corpus of the estate for such a consideration.

The court below said:

> "It will not do to stop with any narrow definition of the word 'sale', which in its ordinary sense means a transfer of property for a fixed price in money or its equivalent (Citing *The Five Percent Cases*, 110 U. S. 471, p. 478)."

It is unnecessary to determine whether the words "to sell" indicate the intention of the testator that a

sale should be only for cash. We have never so contended. But it must be for cash *or its equivalent, i. e.,* bonds, mortgages, or securities of a fixed value—some sales price which would take the place of the property sold in the corpus of the trust estate, produce an income, and descend to the remaindermen. It was the intention of the testator that the trustees should either hold the land or obtain money or its *equivalent, i. e.,* something of fixed value immediately convertible into money. In the *Five Percent* cases referred to by the Circuit Court of Appeals, where this court was defining an act of Congress providing for the admission of the State of Illinois into the Union, by which "five per cent of the net proceeds" of public lands afterwards "sold by Congress" should be reserved and appropriated for certain public uses within the states, this court said:

> "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money *or its equivalent.* When property or money is transferred or paid as a compensation for services, the property or money may be said to be the price of the service; but it can hardly be said that the service is the price of the property or money, or that the property or money is sold to the person performing the service." (110 U. S. 471, p. 487.)

This court thereupon held that the State of Illinois was not entitled to a percentage of the value of public lands disposed of by the United States in satisfaction of military land warrants.

The suggestion in the opinion of the Circuit Court of Appeals that the *equivalent* for money might be, there-

fore, a possible exemption for assessments for street openings, is superficial. Applying the definition of a sale, if a trustee is entitled to sell the corpus of the estate for money or its *equivalent*, it must be interpreted as meaning that the *equivalent* which may be received by the trustee in the place of money are mortgages or securities or bonds of some fixed value readily convertible into money. Nothing can be the *equivalent* of money except something the value of which is fixed and is also readily transmutable into money. A claim for exemption from assessment for future street openings is certainly not convertible into money, nor is the amount of the equivalent of money fixed. Such a claim is vague, uncertain, undetermined and from its inherent nature impossible to be measured in terms of money. Its value constantly varies, particularly where there is no time fixed within which the streets must be opened. It is possible that, if streets are not opened, it will be of no value whatever, as in the case at bar.

A power of sale conferred upon a trustee is interpreted in the New York decisions in even a narrower sense. Under those decisions the power of sale is sometimes violated even where the *equivalent* of money is fixed and constant.

Russell v. *Russell*, 36 N. Y., 581,
Wetmore v. *Porter*, 92 N. Y., 76,
Scholle v. *Scholle*, 113 N. Y., 261,
Turco v. *Trimboli*, 152 App. Div. 431.

The leading case in New York is *Russell* v. *Russell (supra)*. In that case a testator gave all his real and personal estate to his wife for her life with the remainder to his four children. The testator gave power

to his wife to sell and dispose of his real estate or any part thereof at public or private sale as she should deem most expedient and for the best interests of his legatees. By "his legatees" he intended to designate his four children. The widow had no interest in the execution of the power of sale as the income only belonged to her and the corpus of the estate belonged to the remaindermen. In other words, the estate was a trust estate for life to the person exercising the power of sale with a remainder to others, exactly as was the situation in the Langley Estate. The trustee conveyed a portion of the testator's real estate to one of his sons in satisfaction of a debt due to the son from the testator. The court held that such a conveyance was not a good execution of the power of sale and that no title passed to the son by the conveyance, citing Section 65 of Revised Statutes, now Section 105 of the Real Property Law, hereinbefore quoted; that no title passed by the attempted execution and the power of sale, and that the estate descended to the remaindermen unaffected by the conveyance. Here is a case identical with the case at bar. Surely the extinguishing of the debt due to the son from the decedent, was a fixed consideration equivalent to money, yet a transfer from the trustee in return for the satisfaction of such a debt was held not to be a valid exercise of the power of sale, but an act in contravention of the trust.

In *Scholle* v. *Scholle (supra)* a deed given by trustees in consideration of the extinguishment of a claim, against the estate was held not to be a valid exercise of the power of sale, and in *Turco* v. *Trimboli (supra)* the court held that an executor with the ordinary power of sale over real estate had no power to exchange real

estate for other lands, and that such an exchange was an act in contravention of the power of sale.

The logic and reason underlying the rule is made distinctly clear by the application of the result of the case at bar in the Court below and by the President in deducting 81,120 sq. ft. from the amount of the awards. William H. Langley, one of the trustees, was the life beneficiary entitled to receive the income from the corpus of the trust estate. He was not entitled to purchase exemption from assessment for future street openings for the estate by throwing the entire cost upon the remaindermen and by conveying to the City a substantial part of the corpus of the estate. Under the laws of the State of New York if the City had instituted street opening proceedings, the rule would apply that municipal assessments for permanent improvements are apportionable between the life tenant and the remaindermen.

Cairus v. *Chabert,* 3 Edw. Ch., 312,
Stillwell v. *Doughty,* 2 Brad. Surr. 311.
Millers Estate, Tuck., Surr. 346,
Williams v. *Cox,* 3 Edw. Ch., 178,
Fleet v. *Dorland,* 11 How. Pr. 489;;
Thomas v. *Evans,* 105 N. Y. 601,
Chamberlin v. *Gleason,* 163 N. Y. 214.

As stated in *Chamberlin* v. *Gleason,* 163 N. Y., p. 219:

> "The general rule is that municipal assessments for permanent improvements are apportionable between the life tenant and the remaindermen according to the circumstances of the case and their respective interests in the property

(citing *Thomas* v. *Evans,* 105 N. Y., 601; *Peck* v. *Sherwood,* 56 N. Y. 615)."

If the conveyance had not been made and the City had instituted street opening proceedings any assessment for such a permanent improvement would therefore have been proportioned between the life tenant and remaindermen of the estate according to the tables of mortality, set forth in New York Rules of Practice 70, *Kirchner* v. *Kirchner,* 71 Misc. 57.

Notwithstanding this rule, by the delivery of the conveyance the trustees conveyed or undertook to convey away a portion of the estate *which if this decision is correct, has resulted in direct loss to the corpus of the estate of* $162,240. If the deed had not been delivered and the streets had been opened, a large proportion of any assessment for street openings, when assessed, would necessarily have been assessed upon the life tenant, who was one of the trustees who violated the power of sale.

No more vivid reason why the conveyance of the trustees was in contravention of the trust can be presented than the decision of the court below in depriving the remaindermen of $162,240 of the judgment because of this deed.

The Circuit Court of Appeals refers to the *Matter of 67th Street,* 60 How. Pr. 264, which has nothing whatever to do with the definition of the power of sale bestowed upon the trustees by a testator. That case did not involve a conveyance of the title to the corpus of a trust estate. The case holds that where executors in developing a large undeveloped tract of property, to sell lots abutting on unopened streets, filed a map dedicating part of the property as streets, they so burdened the unopened streets with easements of access and for

public purposes, that they are not entitled to any award when the fee of the streets was eventually condemned. The dedication was upheld as an incident of their powers because the dedication resulted in increased value for the lots remaining unsold. We have no quarrel with that doctrine. In this case we urged that the value of the land in the streets was reflected in the adjoining property. But the court has decided otherwise and deprived us of $162,240 of the judgment.

In *Simmons* v. *Crisfeld*, 197 N. Y. 365, which is referred to as approving *Matter of 67th Street*, the court held that an executor authorized, although by a naked power of sale, had power to convey, as appurtenant to part of the land, when sold, an easement of light, air and prospect over the remainder of the land, where the easement is requisite for an advantageous sale. No question of the right to sell the fee in consideration of an exemption from assessment is involved. The same effect that the transfer resulted in advantage to the remainder of the estate should be noted.

The distinction between those cases and the case at bar is that in the dedicatory cases, the executors act for the benefit of the estate, and the value of the property dedicated is reflected in the balance of the land. In this case, no one could tell until after the streets had been opened and the awards to be received by the estate had been balanced against the assessments to be paid, whether the act of the trustees was beneficial or detrimental to the estate. If the decision of the Circuit Court of Appeals is correct it has been undeniably detrimental to the estate in that it has resulted in a loss of $162,240 from the corpus thereof.

There is only one theory upon which the validity of this conveyance can be upheld,—that when the trustees conveyed a portion of the corpus of the estate to the City in trust for streets, the value of the property embraced in the streets immediately was reflected in the remaining property of the estate abutting upon the streets so conveyed,—which was correspondingly enhanced; that there was therefore no loss to the estate; and that the value of the property of the estate subsequent to the conveyance was the same as it had been prior to the conveyance and that the corpus of the trust estate was therefore not diminished.

This is the theory of all the expert witnesses, both for the Langley Estate and the United States upon the trial. A finding of fact to that effect was made by the court below which the Circuit Court of Appeals refused to follow.

There is no escape therefore from the dilemma:

(1.) If the act of the trustees resulted in a transfer of the corpus of the estate to the detriment of the estate their act was in contravention of the trust and void.

(2.) If the act of the trustees enhanced the balance of the land remaining, it can be sustained under the dedication cases. But the act of the trustees cannot be held to be valid and at the same time result in a loss to the corpus of the estate of $162,240 as has been the decision of the court below.

POINT IV.

The City's assignment of errors presented no claim in the court below to any part of the judgment, and the action of that court in ordering the assignment was a plain error which may be remedied in this court.

Upon the trial the City conceded that it claimed no relief and was entitled to none in this action (fol. 86). It claimed title to disputed streets as far as the high water mark and demanded that the complaint be dismissed (answer, fol. 53).

The main assignments of error to the Circuit Court of Appeals was that the complaint should have been dismissed (assignment of error, fols. 495-504). The City was not a party to the judgment of the trial court, and the judgment did not even award costs against the City (Judgment, fols. 57-58).

It is obvious that the City was not aggrieved by the judgment, but was aggrieved by the court's opinion in which the court held that the deed was invalid. The City was in reality attempting to review that opinion which established a precedent adverse to the City's contentions. The opinion forms no part of the judgment appealed from.

> *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451, 465.

Nor may an opinion of the court be made the target of assignment of error for review.

> *Behn M. & Co.* v. *Campbell*, 205 U. S. 403.
> *Mason* v. *United States*, 219 Fed. 547.
> *Gibson* v. *Luther*, 196 Fed. 203.
> *Ogden City* v. *Weaver*, 108 Fed. 564, 567.
> *Columbus Safe Deposit Co.* v. *Burke*, 88 Fed. 630.

This is for the reason that the opinion of the court below may be wrong and yet the judgment in the case may be right.

Stoffregen v. *Moore,* 271 Fed. 680.

This is peculiarily applicable in the case at bar where the court's judgment was correct even if the opinion as to the validity of the deed was wrong. But the City, not being able to review the opinion, and not being affected by or in fact a party to the judgment, was not entitled to review the judgment.

Payne v. *Niles,* 20 How. 219.
Farmers Loan & Trust Co. v. *Waterman,* 106 U. S. 265.

The City's writ of error to the Circuit Court of Appeals should have been dismissed.

Now on its assignment of error to this court, the City asks that the judgment be reversed unless the plaintiff will further assign over $500,000 of the judgment to the City, thus raising a totally new question never presented either to the trial court or the Circuit Court of Appeals (assignments of error, fols. 565-567).

It is elementary that on a trial without a jury a writ of error may only review "rulings of the court in the progress of the trial of the case," which are excepted to at the time, and duly presented by a bill of exceptions (§700 R. S.). There is no such ruling and no exception and no assignment of error as no suggestion that the City was entitled to any award was made at the trial. Indeed the City stipulated otherwise. In view of these circumstances, how may the City be heard here to argue that it is entitled to any part of the judgment? This court has repeatedly held that as it is reviewing a judgment of the Circuit Court of Appeals, the only assign-

ments of error open here are the ones urged in that court.

United States v. *Rogers,* 255 U. S. p. 168.
Pine River Logging Imp. Co. v. *United States,* 186 U. S. 279.
Union Pacific Railway Co. v. *Chicago R. Co.,* 163 U. S. 564.
Keyser v. *Phitz,* 133 U. S. 138.

A consideration of the assignments of error below necessarily invites attention to the fact that the City is not entitled to the assignment, and the court below exceeded its discretion. This is a "plain error" which may be reviewed in this court under Rule 21, even though the judgment of the Circuit Court was in such form that it was impossible for the defendant-in-error to attempt to review it by writ of error, even if the assignment itself were not conditional in form.

POINT V.

The deed from the trustees of the Langley Estate to the City of New York if valid conveyed the property within 61st and 62nd and 63rd Streets only to "The New York Bay" and terminated at high water mark.

(1) The City cannot claim that the deed carried to the pierhead line of 1890 as that point is not before the court under the pleadings.

Encouraged by the totally unexpected action of the Circuit Court of Appeals awarding it $162,240 of the judgment, the City assigns as error that this court should further order the assignment to the City of $589,731.82 additional, representing the compensation awarded for the portions of 61st, 62nd and

63rd Streets between high water mark and the pierhead line of 1884 (assignment of error, record, page 340). This claim is at absolute variance with the City's previous course of conduct throughout the trial. The court refused to permit an amendment of the answer to set up such a claim.

The City's course of conduct shows an absolute lack of good faith in urging this point in view of its concession on the record that the City is not entitled to any relief in this action (fol. 86). It had been stipulated between the plaintiff and the United States that the dispute of title only affected "the real property comprised in the beds of 61st, 62nd and 63rd Streets, Borough of Brooklyn, City of New York, extending from the westerly side of First Avenue to high water mark, the title to which said property is claimed by the United States of America to be in the City of New York." (Stip. Plaintiff's Ex. W. Record p, 309, fol. 510.)

Attached to the complaint is the report of the Judge Advocate General upon the title of the Langley property, in which he finds that only those portions of the street lying between First Avenue and highwater mark were held by the City of New York in fee. (Record, p. 26, fol. 48.)

The War Department Board of Appraisers had deducted from the award 81,120 square feet, being the areas of the streets between First Avenue and the high water line (fol. 49). The answer of the City of New York sets up a claim to the property in the streets between First Avenue and the New York Bay and asserts "that the area of said streets is 81,120 square feet." (Answer, p. 29, fol. 55.) It is thus apparent that the City's answer sets up a claim of title only as far as high water mark. There was no ambiguity, as suggested in the City's brief, about this claim.

Moreover, the Corporation Counsel agreed that the area "between the westerly side of First Avenue and the existing high water mark at the time of the taking" was 81,120 square feet. (Defendant's Ex. 1, Record p. 309.) This stipulation was entered into for the purpose of confining the dispute of title to that area and for the further purpose of adopting the square foot area formerly used by the Government.

Throughout the trial plaintiff's counsel asserted that the dispute only affected title to the property to high water mark (fol. 72) without any objection or contrary suggestion from the City. Testimony was produced as to the area of the streets between First Avenue and the high water mark at the time of the conveyance in 1899, it being the contention of the Langley Estate that additional uplands formed since that time had been made by filling in and not by accretion (fols. 74 and 76). No objection to this testimony was made by the City. It was not until after the court refused to find that the streets between First Avenue and high water mark comprised an entire block in extent, as required by Section 922 of the charter for the validity of a conveyance (See request of finding of the City of New York, Nos. 5, 6 and 7, Record, page 282, fols. 451-2) that the City first suggested that the deed extended to the pierhead line instead of to high water mark.

The City then moved to amend its answer by substituting a claim of title extending as far out as the pierhead line of 1890. (Motion to amend, Record, p. 269.) Naturally this motion to amend, asserting an entirely new and insistent claim totally at variance with the stipulation, answer and previous course of conduct of the City thus made after the case had been decided, was denied. (Record, p. 270, fol. 225).

The denial of the motion was discretionary and cannot be reviewed here.

This court has repeatedly held that the allowance or refusal of amendments to pleadings, and the granting or refusing of leave to file an additional plea, are matters for the discretion of the trial court and are not reviewable.

Chirac v. *Reinicker,* 11 Wheat, 280.
Wright v. *Hollingsworth,* 1 Pet. 165.
Ex Parte Bradstreet, 7 Pet. 634.
Chapman v. *Barney,* 129 U. S. 677, 681.
Bullitt County v. *Washer,* 130 U. S. 142, 145.
Gormley v. *Bunyan,* 138 U. S. 623, 630.

Nevertheless, the City proceeds to argue the case upon the assumption that the motion was granted instead of denied and as if the point is before this court for review, which of course, is not the case.

(2) Under the law of New York the conveyance "to the New York Bay" terminated at high water mark and such construction is corroborated by the map attached to the deed.

At the time of the taking the distance between high water line and the west side of First Avenue at 61st Street, was about 316 feet; at 62nd Street about the same; at 63rd Street about 650 feet due to filling in. The total area of these streets was 81,120 sq. ft. (Stipulation United States, City of New York, Plaintiff's Exhibit 1, p. 309). This involved a claim by the City to less than 5% of the property.

The City's claim to the pierhead line would move the boundaries of the deed to a distance from 1835 to 1882 feet from the west side of First Avenue. In other words the City now attempts to extend the western boundary of the deed an average of about 1500 feet or 1/3 of a mile further into the Bay. At the pierhead line the depth of water was from 35 feet to 40 feet. So the effect of the City's belated motion to amend its answer was to claim as the beds of streets land under water

from one foot to 40 feet in depth, even to a point over 650 feet beyond a bulkhead line beyond which no solid fill could be legally made. The City's claim would extend its streets system to lands which must always remain covered with water.

The area in the streets to high water mark, 81,120 sq. ft. at the time of taking was much greater than at the time of the delivery of the deed, when it was 58,770 sq. ft. (Trust fol. 75). The additional area had even caused by filling and taking 81,120 sq. ft. as the area the City received the most favorable construction of the deed.

Such a vast enlargement of the area in the deed to carry over 1/3 of a mile of lands under water is not justified.

The description in the deed conveys lands "lying within the boundaries of 61st Street as laid down on the Commissioners' Map for the laying out of streets and avenues in the towns of the County of Kings between Second Avenue and the New York Bay" (Exhibit D). Practically the same description applies to 62nd and 63rd Streets and the deed further states "the lands hereinbefore described are shown on the annexed map." The termination of "the New York Bay" naturally meant where the land ended and the bay began. This was at the line of high water. This construction is in harmony with the elementary law of New York State that a deed containing a description of lands adjoining navigable tide waters and extending "to the beach", "to the sea," "to the bay", "to the seashore," carries only to high water mark.

Gerard on Titles to Real Estate, 4th Ed., p. 509,

9 *Corpus Juris*, 182, New York Cases, note 57.

Trustees of East Hampton v. *Kirk*, 68 N. Y., 459,

McRoberts v. *Bergman*, 132 N. Y. 73,

Rockaway Park Improvement Co. v. *City of New York*, 140 App. Div. 160,
John Clarke Estate v. *City of New York*, 165 App. Div., 873,
Tiffany v. *Town of Oyster Bay*, 209 N. Y., 1, 9.

The City states that land under water is presumed to be included in a deed, where the owner parts with upland, unless there is an unmistakable intention to include it. Not only the description, but the town commissioners map to which reference is made and the map attached to the deed show an unmistakable intent not to include therein any lands under water. That doctrine has only been applied where the owner parts with all his upland and would have, therefor, no further use for the lands under water. In this case the owner parted with upland merely to provide access to the waterfront, the real value of which was in the lands under water at which piers could be constructed. Still the intent to exclude any property below high water was clear. The town commissioners map to which reference is made as showing the boundaries of the streets shows the dimensions and locations of the streets existing and laid out as far as the bulkhead line only. No streets are shown such as laid out to the pierhead line over 600 feet further out in the Bay. This map shows a line marked "High water line", about 350 feet from First Avenue, in the middle of a block labeled as 700 feet long. Then there is a lateral street labeled "Narrows Avenue" 80 feet wide out in the water and another block 473 feet long out in the water to the bulkhead line. The description in the deed adopts the western and southern boundaries of the streets but limits the eastern and western boundaries "between Second

Avenue and the New York Bay," viz. at high water mark. That construction has been placed upon the deed by the legal authorities of the United States, (see opinion Judge Advocate, General Exhibit C, fol. 46, Stipulation, Exhibit W, fol. 510, between plaintiff and United States); and also by the City (Stipulation, Exhibit 1, fol. 511, and answer of City, fol. 54) until the City, in order to sustain the validity of the deed, asked the trial court to find that the property between First Avenue and "the New York Bay" comprised an entire block in extent (Requests to Find, Nos. V, VI, and VII, fol. 451) and such requests were refused.

The map attached to the deed itself shows the streets extending from First Avenue to a WAVEY line, and there terminating. Photostat copies of this map will be handed up upon the argument. On the west side of this line are the words "New York Bay", showing clearly that water existed on the western side of the line. If it had been the intention to carry further, Narrows Avenue, and the bulkhead line and pierhead must have appeared on this map. Narrows Avenue does not appear showing clearly that the deed stopped before reaching the Avenue. Nor does the bulkhead line appear on the pierhead line nearly 1/3 of a mile further out into the Bay.

The map is made a part of the deed by reference. If the monuments in the deed were repugnant to those of the map (which is not the case, for one corroborates the other) they must be construed together.

Borkman v. *Kurzman*, 94 N. Y. 272, 276.

CONCLUSION.

The judgment should be affirmed with interest thereon as provided by Rule 23 of this court, and the conditional assignment of $162,240 of the judgment to the City of New York should be declared null and void.

January, 1923.

Respectfully submitted,

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